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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CANYON COUNTY,

Petitioner,

v.

SYNGENTA SEEDS, INC., *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

HOWARD W. FOSTER
Counsel of Record
JOHNSON & BELL, LTD.
33 W. Monroe Street
Suite 2700
Chicago, IL 60603
(312) 372-0770

PAUL J. ORFANEDES
JAMES F. PETERSON
JUDICIAL WATCH, INC.
501 School Street, S.W.
Suite 500
Washington, DC 20024
(202) 646-5172

Counsel for Petitioner

QUESTIONS PRESENTED

1. Does the phrase "business or property" in the civil damages provision of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c), exclude a government entity's costs of providing services?

2. May a court dismiss a RICO complaint for lack of proximate causation without determining if the plaintiff alleges an injury directly caused by the RICO violations?

LIST OF PARTIES

Petitioner:

Canyon County, a political subdivision of the State of Idaho.

Respondents:

1. Syngenta Seeds, Inc., a Delaware corporation;

2. Sorrento Lactalis, Inc., a Delaware corporation;

3. Swift Beef Company, a Delaware corporation;

4. Harris Moran Seed Co., a California corporation;

5. Alberto Pacheco, an individual.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Canyon County, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the district court granting Respondents' Motion to Dismiss Canyon County's Complaint for failure to state a claim was not reported and is reproduced in the appendix (Pet. App.) at 38a. The opinion of the Ninth Circuit affirming the dismissal of the district court was published at 519 F.3d 969 (9th Cir. 2008) and is reproduced at Pet. App. 3a. The Ninth Circuit's order denying rehearing *en banc* was not reported and is reproduced at Pet. App. 1a.

STATEMENT OF JURISDICTION

The district court and the Ninth Circuit had jurisdiction over this case as a federal question pursuant to 28 U.S.C. § 1331 and 18 U.S.C. § 1964(c). The judgment of the Ninth

Circuit was entered on March 21, 2008. An order denying Petitioner's petition for rehearing *en banc* was entered on May 1, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1964(c) of Title 18 of the United States Code provides, in pertinent part, that:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . .

STATEMENT OF THE CASE

This Petition arises from an action by Canyon County, Idaho (hereafter "the County") to recover costs it has expended

providing services to illegal immigrants.[1] Canyon County sued four large employers for knowingly hiring many illegal immigrants who, during their employment, committed crimes in the County, thereby costing the County money for criminal justice services including incarcerating them in its jail.[2] Many other of these illegal immigrants wrongfully obtained health and welfare services from the County.[3] Overall, the County has paid millions of dollars in services for these illegal immigrants in the four years prior to filing the action in 2005 pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO").[4]

In 1996, Congress amended RICO to add certain immigration law offenses as RICO "predicate acts" (racketeering activity).[5]

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[1] See Pet. App. 55a (First Amended Complaint (hereafter "Complaint") at ¶¶ 1-2).

[2] Id.

[3] Id. at ¶¶ 26, 32, 38-40, 43.

[4] Id. at ¶ 2; 18 U.S.C. §§ 1961-1968.

[5] These violations were added to RICO's list of state common law and federal statutory violations enumerated at 18 U.S.C. § 1961. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-

The County's action, filed in 2005, sought damages caused by the Respondents' knowing employment of illegal immigrants. The district court, without permitting the County to take any discovery, dismissed the suit with prejudice, for failure to state a RICO claim, concluding that the damages the County sought to recover, the costs of providing municipal services, were not "business or property" within the meaning of 18 U.S.C. § 1964(c), RICO's civil damages provision (hereafter § 1964(c)).

The Ninth Circuit affirmed this conclusion, refusing to construe RICO as written. It held: "We simply do not think the term 'business or property' can be interpreted to encompass the sorts of interests that the

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132 § 433. 110 Stat. 1214. The new RICO provisions were codified at 18 U.S.C. § 1961(1)(F), making violations of section 274 of the Immigration and Nationality Act (8 U.S.C. § 1101 et seq.), "racketeering activity" (also referred to in case law as "predicate acts"). Section 274 of the Act is codified at 8 U.S.C. § 1324. The County's suit asserted that Respondents violated 8 U.S.C. § 1324(a)(3)(A) (prohibiting the employment of ten or more illegal aliens per year).

County relies on in this case." Canyon County v. Syngenta Seeds, Inc., 519 F.3d 969, 980 (9th Cir. 2008). This conclusion, that a government entity cannot sue to recover damages unless it is acting as "an ordinary marketplace actor" under RICO, conflicts with the Seventh and Eighth Circuits' conclusions which have rejected the need for any such marketplace or commercial injury.[6]

The Ninth Circuit also impermissibly refused to adhere to this Court's unanimous instruction that the lower courts not read limitations into RICO.[7] Thus, the first question is whether the Ninth Circuit was

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[6] Illinois Dep't of Revenue v. Phillips, 771 F.2d 312, 314 (7th Cir. 1985)(rejecting the contention that the state could not sue for enforcement of unpaid taxes under RICO because it was not injured in its business or property); Bennett v. Berg, 685 F.2d 1053, 1059 (8th Cir. 1982)(rejecting the argument that RICO requires a "commercial or competitive injury").

[7] Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131, 170 L. Ed. 2d 1012, 1028 (2008)("[W]e are not at liberty to rewrite RICO to reflect their--or our--views of good policy. We have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe").

correct in interpreting the phrase "business or property" in RICO so as to exclude the County's costs of providing services.

The Ninth Circuit also concluded, based solely on the County's Complaint, that its injury was not "proximately" caused by the Respondents' RICO violations. The Ninth Circuit did so by disregarding the first step in the proximate causation analysis: determining if some other party was more directly injured by the alleged RICO violations.[8] Every other Circuit analyzes proximate causation by first determining if the plaintiff's alleged injury flows directly from the RICO violation, or is derivative of an injury to another party.[9] In light of this

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[8] Canyon County, 519 F.3d at 983 ("[W]e need not inquire into the question of whether there are more immediate victims of the defendants' alleged RICO violations who are likely to sue").

[9] See Laborers Local 17 Health & Benefit Fund v. Philip Morris, 191 F.3d 229, 238-39 (2d Cir. 1999)("As these cases demonstrate, the critical question posed by the direct injury test is whether the damages a plaintiff sustains are derivative of an injury to a third party. If so, then the injury is indirect; if not, it is direct"); New West, L.P. v. City of Joliet, 491 F.3d 717, 721 (7th Cir. 2007)("For some

Court's decision in Anza v. Ideal Steel Supply Corp., where it held direct injury was "the central question" in the proximate causation analysis, the Ninth Circuit's decision must be reversed.[10]

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statutes it matters whether the injuries are direct or derivative," *citing* Anza v. Ideal Steel Supply Corp., 547 U.S. 451(2006), Holmes v. Securities Investor Prot. Corp., 503 U.S. 258 (1992)); V-Tech Servs. v. Street, 215 Fed. Appx. 93, 96 (3d Cir. 2007)("V-Tech's RICO claims do not satisfy the requirement of proximate causation because the direct victim of the defendant's fraudulent conduct was the federal, state, and local government entities that awarded and thereafter funded the contract with V-Tech"); In the Matter of Seven Seas Petroleum Inc., 522 F.3d 575, 586 (5th Cir. 2008)(direct injury equated with being not derivative of an injury to another party); Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 614 (6th Cir. 2004)("RICO not only imposes a statutory standing limitation on claimants who seek recovery for derivative or indirect injuries...").

[10] Anza, 547 U.S. 451, 461 (2006)(hereafter "Anza").

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT AS TO WHETHER "BUSINESS OR PROPERTY" SHOULD BE READ BROADLY OR WITH JUDGE-MADE RESTRICTIONS.

A. RICO's Plain Language Supports the County.

The question presented here is whether § 1964(c) should be interpreted according to its plain and ordinary meaning or, rather, that judge-made restrictions should be read into it. The Ninth Circuit has interpreted the phrase so as to exclude the County's claim. It did so primarily because it found nothing in the legislative history of RICO to indicate Congress intended for this type of claim to be asserted. And absent that express authorization, it concluded there was no such intent. "But had Congress intended such a result, we believe that Congress would have been more explicit; the term business or

property does not readily connote a government's interest in the services it provides in its sovereign or quasi-sovereign capacity." Canyon County, 519 F.3d at 980.[11]

The Second Circuit has taken the same approach, choosing to give the 'business or property' language a narrow interpretation because of its quite candid hostility to novel uses of civil RICO. It held: "We have stated our own views that the RICO provisions cast too wide a net with respect to civil actions that may be brought." Town of W. Hartford v. Operation Rescue, 915 F.2d 92, 104 (2d Cir. 1990).

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[11] There is no dispute that the County is a "person" within the meaning of RICO, and thus may assert a claim. 18 U.S.C. § 1961(3), defining "person" as including "any individual or entity capable of holding a legal or beneficial interest in property." RICO cases have been successfully prosecuted by governmental entities in all circuits. See, e.g., County of Oakland v. City of Detroit, 866 F.2d 839 (6th Cir. 1989); Carter v. Berger, 777 F.2d 1173 (7th Cir. 1985)(holding that Cook County, Illinois was the proper party to sue under RICO for unpaid taxes); Republic of the Philippines v. Marcos, 862 F.2d 1355, 1358 (9th Cir. 1988).

By contrast, the Seventh Circuit interpreted 'business or property,' without second-guessing Congress' language:

> Limitations on the type of injury, such as requiring a 'racketeering injury' have been rejected . . . . While the Supreme Court held that 'business or property' phrase in the Clayton Act refers only to commercial interests and competitive injuries, this is not the case under RICO, although a few courts have attempted to draw such a line. In this case the Illinois Department of Revenue has been injured in its property to the extent that it has been defrauded out of $14,500 in unpaid taxes.

Illinois Dep't of Revenue v. Phillips, 771 F.2d 312, 314 (7th Cir. 1985) (internal citations

omitted).[12] The Court thus rejected the policy-driven argument, accepted by the district court that "RICO should not become a vehicle for federal jurisdiction and damages in state sales tax cases." Id.

This is precisely the view taken here by the Ninth Circuit. The Court was simply unconvinced that in enacting RICO, "Congress meant to disrupt settled expectations and alter the legislatively-chosen system of funding local government services." Canyon County, 519 F.3d at 980. But in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985), this Court dispatched the notion that judges must search RICO's sparse legislative history to pinpoint evidence that its intent matches up with the implications of a particular case. "Given the plain words of the statute, we cannot agree with the court below that Congress could have had no inkling of § 1964(c)'s implications. Congress

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[12] See also Carter v. Berger, 777 F.2d 1173, 1176 (7th Cir. 1985)("RICO applies to tax frauds, and a government may recover losses from the underpayment of taxes," holding that Cook County, Illinois, not its taxpayers, was the proper plaintiff in an action to collect unpaid taxes).

inkling's are best determined by the statutory language that it chooses . . . ." Sedima, 473 U.S. at 495 n. 13 (internal citation and punctuation omitted).

Thus, the Ninth Circuit was not writing on a blank slate. If it were, this Court might allow the conflict to develop further. But this Court resolved this issue in 1985 and just reaffirmed that interpretation last term, rejecting the argument that § 1964(c) requires "reliance." Again, adhering to the unambiguous language of § 1964(c), it held that no such limitation was to be read into that provision:

> We are not at liberty to rewrite RICO to reflect their - or our - views of good policy. We have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe.

Bridge v. Phoenix Bond & Indem., Co., 128 S. Ct. 2131, 170 L. Ed. 2d 1012, 1028 (2008).

More than two decades ago, this Court rejected the arguments that § 1964(c) required either a prior criminal conviction or a "racketeering injury." Sedima, 473 U.S. at 488, 495. The Court refused to read those concepts into the unambiguous wording Congress chose to use in § 1964(c) because "RICO is to be read broadly." Id. at 498.[13] And the Court held that was particularly so with regard to § 1964(c). Id. at 492 n. 10 ("Indeed, if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident").[14]

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[13] The Court reviewed the legislative history of § 1964(c) in Sedima, 473 U.S. at 486-87, and found no support for either of the judicially-created limitations on damages at issue. In doing so, it was unconvinced by the dissenting justices that the Court "should be reluctant to displace the well-entrenched federal remedial schemes absent clear direction from Congress." Id., at 507 (Marshall, J., dissenting).

[14] RICO is to be "liberally construed to effectuate its remedial purposes." Pub. L. 91-452, § 904(a), 84 Stat. 947. Id., at 498. The Court has adhered to this view ever since. See, e.g., H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 237 (1989)("We begin, of course with RICO's text, in which Congress followed a pattern of utilizing terms and concepts of breadth")(internal citation and quotations omitted);

B. The Ninth Circuit's Antitrust Injury Requirement Is Erroneous.

The Court should also accept the Petition to resolve the Circuit split as to whether the phrase "business or property" requires an antitrust injury. The Ninth Circuit, following the Second Circuit, construed "business or property" in § 1964(c) in the same manner as in the Clayton Antitrust Act, i.e., to require injury from the loss of competition.[15] It held:

> As used in the Clayton Act's private right of action, then, the phrase business or property excludes states' interests in their sovereign or quasi-sovereign capacities, but does include states' interests as ordinary marketplace actors. We believe that this interpretation of the phrase business or property should apply in the context of a civil RICO claim as well.

Bridge, 170 L. Ed. 2d at 1028.

[15] 15 U.S.C. § 15.

Canyon County, 519 F.3d at 978 (internal quotations omitted). Therefore, the Ninth Circuit, following the reasoning of the Second Circuit, would permit the County to assert a claim under § 1964(c) if it paid supra-competitive prices in a commercial transaction, i.e., as "an ordinary marketplace actor[]." Id.[16] Under this reasoning both Circuits would deny the County the right to sue for damages caused by the immigration predicate acts Congress expressly added to RICO, but would permit the County to sue for an amorphous "competitive injury" which Congress did not add to the statute.[17] This is absurd.

The Seventh and Eighth Circuits have correctly rejected this antitrust injury requirement in civil RICO because it makes

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[16] It cited with approval the Sixth Circuit's decision in County of Oakland v. City of Detroit, 866 F.2d 839, 847 (6th Cir. 1989), which permitted the County's RICO claim for overpayment for sewer services to proceed. Canyon County, 519 F.3d at 976.

[17] Moreover, this "competitive injury" requirement would only apply to government entities, creating a classification which Congress did not enact.

no sense. The statutes have different "objectives." Schacht v. Brown, 711 F.2d 1343, 1358 (7th Cir. 1983):

> [T]o the extent that antitrust law and policy are increasingly concerned primarily with market efficiency rather than the deleterious efforts of concentrated market power itself, analogies to that body of law [to RICO] become increasingly irrelevant, since the exercise of social power by organized crime is thought to be *malim in se.*

Id. (rejecting the argument that § 1964(c) required "competitive injury" as unsupported by RICO's legislative history or plain language).[18] The Eighth Circuit has reached the same conclusion, rejecting the requirement of an antitrust injury in § 1964(c)

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[18] See also Illinois Dep't of Revenue, 771 F.2d at 315.

> In other words, although RICO borrowed the tools of antitrust law to combat organized criminal activity, we do not believe the RICO Act was limited to the antitrust goal of preventing interference with free trade. Congress did not see the objectives of RICO and the antitrust laws as coterminous. We conclude that an allegation of commercial or competitive injury is not required by the RICO Act.

Bennett v. Berg, 685 F.2d 1053, 1059 (8th Cir. 1982)(internal citations omitted).

This Court agrees with the view of the Seventh and Eighth Circuits. It noted that the requirement of some circuits of a "racketeering injury" was a concept improperly imported from the Clayton Act. Sedima, 473 U.S. at 499 ("In borrowing its racketeering injury requirement from *antitrust standing principles*, the court below created exactly the problems Congress sought to avoid") (emphasis added); Holmes v. Securities Investor Prot. Corp., 503 U.S. 258,

270 (noting the rejection "of the concept of antitrust injury to RICO")(internal quotations omitted); *cf.* Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 166 (2001)(noting that the intracorporate conspiracy doctrine does not apply under RICO because it "turns on specific antitrust objectives").

Even in the Clayton Act context, this Court has refused to require a "commercial injury" in construing "business or property" as "strained." Reiter v. Sonotone Corp., 442 U.S. 330, 338-339 (1979). And if no commercial injury is required under the Clayton Act, then the Ninth Circuit's requirement of one in § 1964(c) is indefensible.

II. THE PROXIMATE CAUSATION ANALYSIS REQUIRES THAT THE COURT DETERMINE IF THE PLAINTIFF ALLEGES A DIRECT INJURY.

The Ninth Circuit's dismissal of the County's claim, for lack of proximate causation at the pleading stage, where no

more direct victim of the RICO violation was identified, conflicts with the proximate causation analysis of every other Circuit and this Court. This Court requires a "direct" relationship between the RICO defendant and the plaintiff's injury. Anza, 547 U.S. at 461 ("When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries").[19] In Anza, the Plaintiff's complaint made it clear that the State of New York,-not Ideal Steel, was the directly injured party. And so Ideal Steel pled itself out of court.

Canyon County did not plead itself out of court. Its Complaint does not identify a more directly injured victim of the alleged RICO violations. And the Ninth Circuit did not identify one either. It held the directness of the injury was irrelevant ("we need not inquire into the question whether there are

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[19] See also Sosa v. Alvarez-Machain, 542 U.S. 692, 704 (2004) ("Proximate causation is causation substantial enough and close enough to the harm to be recognized by law, but a given proximate cause need not be, and frequently is not, the exclusive proximate case of harm")(internal citation omitted).

more immediate victims of the defendants' alleged RICO violations who are likely to sue").[20]

No other court has read the direct injury requirement out of RICO.[21] Thus, its

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[20] Canyon County, 519 F.3d at 983.

[21] See, e..g., Bridge, 170 L. Ed. 2d at 1027 (noting that "no more immediate victim is better suited to sue."); Laborers Local 17 Health & Benefit Fund v. Philip Morris, 191 F.3d 229, 238-39 (2d Cir. 1999)("As these cases demonstrate, the critical question posed by the direct injury test is whether the damages a plaintiff sustains are derivative of an injury to a third party. If so, then the injury is indirect; if not, it is direct"); Williams v. Mohawk Indus., Inc., 465 F.3d 1277, 1289-90 (11th Cir. 2007)(concluding that dismissal in Holmes and Anza was appropriate "because a more direct victim could bring suit" and without such a finding, the plaintiff is the proper party to sue); Loeb v. Sumitomo Corp., 306 F.3d 469, 484 (7th Cir. 2002)("The directness inquiry further focuses on the presence of more immediate victims of an antitrust violation in a better position to maintain a treble damages action"); Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 614 (6th Cir. 2004)("RICO also not only imposes a statutory standing limitation on claimants who seek recovery for derivative or indirect injuries, but also incorporates other traditional proximate-cause

conclusion that Anza applies "fully to cases like this one, where the harm to the plaintiff from the defendant's RICO violation *does not flow through any intervening victims*" is flatly wrong and must not be allowed to persist.[22]

Thus, because the Complaint does not indicate a more immediate victim of the RICO violations, the dismissal for lack of proximate causation was erroneous. And this is confirmed by well-established tort principles which make an employer liable for torts committed by its employees in cases such as this one, where the employer disregarded the risk of employing known criminals. RESTATEMENT (THIRD) OF AGENCY, § 7.05(1).[23]

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limitations on claimants," including foreseeability).

[22] Canyon County, 519 F.3d at 983 (emphasis added)

[23] See, e.g., Tallahassee Furniture Co. v. Harrison, 583 So. 2d 744, 750 (Fla. App. Ct. 1991)("Most jurisdictions, including Florida, recognize that independent of the doctrine of respondeat superior, an employer is liable for the willful tort of his employee committed against a third person if he knew or should have known that the employee was a threat to others"); accord, 10 LABOR AND EMPLOYMENT LAW, § 270.03[3][a] (Matthew Bender

> A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent.

RESTATEMENT (SECOND) OF TORTS § 307:

> It is negligence to use an instrumentality, whether a human being or a thing, which the actor knows or should know to be so incompetent, inappropriate, or defective, that its use involves an unreasonable risk of harm to others.

RESTATEMENT (SECOND) OF TORTS §§ 302(B) (Risk of Intentional or Criminal Conduct), 317 (Duty of Master to Control Conduct of Servant), and 449 (Tortious or Criminal Acts

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2007).

the Probability of Which Makes Actor's Conduct Negligent).

Accordingly, the Idaho Supreme Court has held an employer liable for the harm caused to third parties by an employee with known criminal tendencies. Thus, the foreseeability of harm, which is ordinarily a jury question,[24] should not have been decided in this case at the pleading stage.[25] As this Court has held, it is inappropriate to substitute the defendant's speculative notions of foreseeability for the harm alleged.[26] And the leading treatise on torts concludes that the foreseeability of harm is perhaps the most controversial question in the entire field.[27]

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[24] See, e.g., Bliss v. Franco, 446 F.3d 1036, 1047 (10th Cir. 2006); Fithian v. Reed, 204 F.3d 306, 309 (1st Cir. 2000); Schultz v. Eslick, 788 F.2d 558, 560 (9th Cir. 1986); Cullen v. BMW of North Am., Inc., 691 F.2d 1097, 1103 (2d Cir. 1982).

[25] Canyon County, 519 F.3d at 982 (speculating on "numerous other factors that could lead to higher expenditures by the County").

[26] Bridge, 170 L.Ed. 2d at 1027 ("But that eventuality, in contrast to respondents' direct financial injury, seems speculative and remote").

[27] PROSSER AND KEETON ON TORTS at 280 (5th ed. 1984)("There is perhaps no other one issue in the law

Moreover, it "never arises until causation has been established."[28] Thus, it should not even have been addressed in determining whether the County's alleged injury was proximately caused by the RICO violations.

For these reasons, this Court should accept this Petition to determine if the Ninth Circuit's unprecedented approach to RICO proximate causation, in which the directness of the injury is disregarded, is correct.

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of torts over which so much controversy has raged, and concerning which there has been so great a deluge of legal writing")

[28] Id. at 281.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

HOWARD W. FOSTER
Counsel of Record
JOHNSON & BELL, LTD.
33 W. Monroe Street
Suite 2700
Chicago, IL 60603
(312) 372-0770

PAUL J. ORFANEDES
JAMES F. PETERSON
JUDICIAL WATCH, INC.
501 School St., S.W.
Suite 500
Washington, DC 20024
(202) 646-5172

Counsel for Petitioner

AUGUST 13, 2008

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CANYON COUNTY, a political subdivision of the State of Idaho,	)	FILED MAY 01, 2008
Plaintiff - Appellant,	)	No. 06-35112
v.	)	DC No. CV 05-0306 EJL D. Id.
SYNGENTA SEEDS, INC., a Delaware corporation; SORRENTO LACTALIS, INC., a Delaware corporation; SWIFT BEEF COMPANY, a Delaware corporation; HARRIS MORAN SEED CO., a California corporation; ALBERT PACHECO,	)	**ORDER**

an individual,)
)
Defendants -)
Appellees.)

Before: CANBY, TASHIMA, and CALLAHAN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge Callahan votes to deny the petition for rehearing en banc and Judges Canby and Tashima so recommend. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f). The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX B

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CANYON COUNTY, a political subdivision of the State of Idaho,	)	
Plaintiff-Appellant,	)	No. 06-35112
v.	)	
SYNGENTA SEEDS, INC., a Delaware corporation;	)	D.C. No CV 05-0306 EJL
SORRENTO LACTALIS, INC., a Delaware corporation;	)	
SWIFT BEEF COMPANY, a Delaware corporation;	)	
HARRIS MORAN SEED CO., a California corporation;	)	
ALBERT PACHECO, an individual,	)	
Defendants-Appellees.	)	

Appeal from the United States District Court for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Argued and Submitted
August 7, 2007—Seattle, Washington

Filed March 21, 2008

Before: William C. Canby, Jr., A. Wallace Tashima, and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Tashima

COUNSEL

Howard W. Foster, Johnson & Bell, Ltd., Chicago, Illinois, for the plaintiff-appellant.

George R. Wood, Littler Mendelson, P.C., Minneapolis, Minnesota, for defendant-appellee Syngenta Seeds, Inc.

Juan P. Morillo, Sidley Austin LLP, Washington, D.C., for defendant-appellee Sorrento Lactalis, Inc.

Marie R. Yeates, Vinson & Elkins LLP, Houston, Texas, for defendant-appellee Swift Beef Company.

Richard A. Lcasia, Thelen Reid & Priest, LLP, San Jose, California, for defendant-appellee Harris Moran Seed Company.

Cynthia J. Wooley, Ketchum, Idaho, for defendant-appellee Albert Pacheco.

OPINION

TASHIMA, Circuit Judge:

This case involves an Idaho county's attempt to recover damages under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, for additional monies it claims to have expended on public health care and law enforcement services for undocumented immigrants. Plaintiff-appellant Canyon County commenced this action against four companies and one individual under RICO's civil enforcement provision, 18 U.S.C. § 1964(c), alleging that defendants engaged in an illegal scheme of hiring and/or harboring undocumented immigrant workers within the County, and that their actions forced the County to pay "millions of dollars for health care services and criminal justice services for the illegal immigrants."

The district court concluded that the County did not have statutory standing under § 1964(c) because the County did not meet the threshold requirement that a civil plaintiff be "injured in his business or property" by reason of the alleged RICO violation. Consequently, the court dismissed the County's complaint.

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the district court. We agree with the district court that the County has failed to allege that it was injured in its business or property. We also conclude that, with respect to almost all of the defendants' alleged RICO violations, the County cannot show that its claimed injuries were proximately caused by defendants' conduct. For both of these reasons, the County lacks statutory standing to pursue its federal RICO claims.

BACKGROUND

I. Civil Enforcement Under RICO

RICO focuses on "racketeering activity," which the statute defines as a number of specific criminal acts under federal and state

laws. *See* 18 U.S.C. § 1961(1). As relevant to this case, acts which are indictable under § 274 of the Immigration and Nationality Act ("INA") are included in the definition of racketeering activity. 18 U.S.C. § 1961(1)(F). INA § 274 (codified as amended at 8 U.S.C. § 1324) criminalizes the bringing in, transportation, harboring, and employment of undocumented aliens.

Substantive violations of RICO are defined in 18 U.S.C. § 1962. Under § 1962(c), it is illegal for any person "to conductor participate, directly or indirectly, in the conduct of [an] enterprise's affairs through a pattern of racketeering activity," where that enterprise affects interstate commerce. It is also illegal for any person to conspire to do so. 18 U.S.C. § 1962(d). A "pattern of racketeering activity" requires at least two predicate acts of racketeering activity, as defined in 18 U.S.C. § 1961(1), within a period of ten years. 18 U.S.C. § 1961(5).[1]

Under RICO's civil enforcement mechanism, "[a]ny person injured in his

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[1]RICO violations are criminally punishable by fines, forfeiture, and imprisonment. 18 U.S.C. § 1963(a).

business or property by reason of a violation of [18 U.S.C. § 1962] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . ." 18 U.S.C. § 1964(c). To have standing under § 1964(c), a civil RICO plaintiff must show: (1) that his alleged harm qualifies as injury to his business or property; and (2) that his harm was "by reason of" the RICO violation, which requires the plaintiff to establish proximate causation. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

II. Canyon County's Complaint

The County's first amended complaint ("complaint") names as defendants Syngenta Seeds, Inc. ("Syngenta"), Sorrento Lactalis, Inc. ("Sorrento"), Swift Beef Company ("Swift"), Harris Moran Seed Company ("Harris"), and Albert Pacheco. Because we are reviewing the dismissal of the complaint, we assume that the factual allegations of the complaint, summarized below, are true. According to the complaint, each of the four defendant companies knowingly employed

and/or harbored large numbers of illegal immigrants within Canyon County, in an "Illegal Immigrant Hiring Scheme."[2] The companies' actions have damaged the County because the County "has paid millions of dollars for health care services and criminal justice services for the illegal immigrants who have been employed by the defendants in violation of federal law." The individual defendant, Pacheco, has engaged in a policy of "Wilful Blindness and Harboring" of illegal immigrants, in his role as director of a local social service agency, which has resulted in similarly increased costs for the County.

Defendants Syngenta and Harris are both growers and processors of agricultural commodities. The County claims that both companies have deliberately hired hundreds of workers who the companies knew were not authorized to work in the United States. Working with a farm labor contractor, Ag Services, the companies agreed to employ undocumented immigrants supplied by Ag Services. The contractor acts as a "front" for

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[2]Each defendant apparently conducted its own separate scheme, as there are no allegations that the defendants cooperated with each other in any way.

Syngenta and Harris: in addition to supplying workers, the contractor channels the workers' wages to them, completes fraudulent I-9 employment eligibility forms for the workers, and supplies the workers with false documents. The companies have thus allegedly violated both 8 U.S.C. § 1324(a)(3),[3] which criminalizes knowing hiring of more than ten unauthorized aliens during a single year, and 8 U.S.C. §

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[3]Under 8 U.S.C. § 1324(a)(3)(A), it is illegal for any person "during any 12-month period, [to] knowingly hire[ ] for employment at least 10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B) . . . ." An alien described in subparagraph B "is an alien who— (i) is an unauthorized alien (as defined in section 1324a(h)(3) of this title), and (ii) has been brought into the United States in violation of this subsection." 8 U.S.C. § 1324(a)(3)(B).

1324(a)(1)(A)(iii),[4] which criminalizes harboring of unauthorized aliens.

The County further alleges that Syngenta and Harris have each formed an "association-in-fact enterprise" with the farm labor contractor, and that the companies' sustained custom of hiring and/or harboring undocumented workers amounts to a pattern of racketeering activity. As a consequence, the companies have allegedly violated 18 U.S.C. § 1962(c), by participating in the conduct of an enterprise's affairs through a pattern of racketeering activity.

The complaint contains similar allegations against Sorrento, a cheese processor, and Swift, a meat packer, the only difference being that Sorrento and Swift have allegedly formed "association-in-fact"

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[4] Under 8 U.S.C. § 1324(a)(1)(A)(iii), it is illegal for any person to "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, . . . harbor[ ]. . . or attempt[ ] to . . . harbor . . . such alien in any place, including any building or any means of transportation."

enterprises with a different labor contractor, Labor Ready.

The County's claim against defendant Pacheco is distinct, as it is not based on the hiring of undocumented immigrants. Instead, the County alleges that Pacheco, in his position as Executive Director of the Idaho Migrant Council, has directed his staff to assist immigrant workers in fraudulently applying for public benefits, despite Pacheco's knowledge that the workers lacked legal status in the United States and were ineligible for such benefits. In directing his staff to take these actions, Pacheco has allegedly committed a pattern of racketeering activity, by knowingly harboring undocumented immigrants in violation of 8 U.S.C. § 1324(a)(1)(A)(iii). Thus, based on his association with the Migrant Council, which is asserted to be a RICO enterprise, Pacheco has allegedly violated 18 U.S.C. §§ 1962(c) and 1962(d).[5]

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[5]The complaint also charges Pacheco with violations of the Idaho Racketeering Act, Idaho Code §§ 18-7801 to 18-7805.

III. Dismissal by the District Court

Defendants filed motions to dismiss the County's complaint, challenging both the County's standing under RICO and the adequacy of the County's allegations of substantive RICO violations. The district court granted defendants' motions and dismissed the complaint in its entirety. It held that the County lacked statutory standing to bring its federal RICO claims because it had not been injured in its business or property by the alleged conduct constituting the RICO violations.

In evaluating whether the County had alleged injuries of a type cognizable under § 1964(c), the district court first discussed the tort doctrine known as the "municipal cost recovery rule," drawing on our decision in *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry.*, 719 F.2d 322 (9th Cir. 1983). In *City of Flagstaff*, we held that, under Arizona law, a municipality could not recover the cost of public services for fire or safety protection from a negligent tortfeasor. *Id.* at 323. We did, however, recognize several exceptions to the "municipal cost recovery rule," including exceptions allowing municipal recovery

"where it is authorized by statute or regulation" and "where the acts of a private party create a public nuisance which the government seeks to abate." *Id.* at 324.

Noting that the County appeared "to concede the existence of the municipal cost recovery rule," the district court rejected the County's argument that its claims fit within either the exception for suits to abate a public nuisance, or the exception for suits authorized by statute. First, the district court stated that the County was not acting in its governmental capacity to abate a nuisance, but suing for treble damages under civil RICO. It then considered the County's argument that the RICO statute itself authorized its recovery. The court rejected this contention, citing what it characterized as "extensive persuasive authority" from other circuits to the effect that a municipality may not recover under RICO for alleged injuries to its governmental functions.

Thus, relying on the municipal cost recovery rule and on case law from other circuits, the district court concluded that the County's claim for the costs of municipal services did not qualify as an injury to

business or property within the meaning of RICO. On this basis, the court dismissed the federal RICO claims against all defendants and entered judgment against the County.[6] The County timely appealed.

STANDARD OF REVIEW

In reviewing dismissal of the County's complaint under Federal Rule of Civil Procedure 12(b)(6),[7] "we accept as true the

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[6]Upon dismissing the federal RICO counts against all defendants, the court also dismissed the Idaho Racketeering Act claims against Pacheco without prejudice to refiling those claims in state court.

[7]The district court did not specify whether its dismissal was based on Federal Rule of Civil Procedure 12(b)(1), lack of subject matter jurisdiction, or 12(b)(6), failure to state a claim upon which relief can be granted, noting that "the case law is unclear as to whether a challenge to a plaintiff's standing under RICO is jurisdictional." There is case law from other circuits suggesting that statutory standing may sometimes be a jurisdictional prerequisite. *See Lerner v. Fleet Bank*, 318 F.3d 113, 126-29 (2d Cir. 2003). We have held, however, that the question of statutory standing is to be resolved under Rule 12(b)(6), once Article III standing has been established. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004)

("If a plaintiff has suffered sufficient injury to satisfy the jurisdictional requirement of Article III but Congress has not granted statutory standing, that plaintiff cannot state a claim upon which relief can be granted.").

In this instance, we preliminarily conclude that the County has met Article III's jurisdictional requirements. Although, as we discuss below, the County cannot show the proximate causation that is necessary for civil RICO standing, the County's allegation that the defendants' hiring and/or harboring of undocumented immigrants within the County caused additional strain on County-provided health and public safety services meets the less rigorous Article III causation threshold, at least at this stage of the proceedings. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (stating that Article III requires the plaintiff to have suffered an injury that is "fairly traceable" to the defendant's conduct); *Barbour v. Haley*, 471 F.3d 1222, 1226 (11th Cir. 2006) ("[F]or purposes of satisfying Article III's causation requirement, we are concerned with something less than the concept of proximate cause.") (citation and internal quotation marks omitted), *cert. denied*, 127 S. Ct. 2996 (2007); *Lerner*, 318 F.3d at 122 & n.8 (holding that plaintiffs' allegations failed to meet RICO proximate causation requirements but satisfied "the lesser burden for constitutional standing"). Thus, because Article III jurisdiction is not at issue, we review the question of whether the County satisfies civil RICO's standing requirements

factual allegations in the amended complaint." *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1994 (2006). We will uphold the dismissal "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."[8] *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1167 (9th Cir. 2002) (citation and internal quotation marks omitted). We may, however, affirm the dismissal on any ground supported by the record. *McKesson HBOC, Inc. v. N.Y. State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1090 (9th Cir. 2003).

DISCUSSION

[1] A civil RICO "plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the

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under the standard for Rule 12(b)(6).

[8]Because the County cannot meet the more liberal "any set of facts" standard, we need not decide whether the Supreme Court's recent "retirement" of the "no set of facts" standard, *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1968-69 (2007), and its adoption of a new "plausibility" standard, *see id.* at 1965-67, applies to RICO complaints.

violation." *Sedima*, 473 U.S. at 496; *see* 18 U.S.C. § 1964(c). Below, we examine whether the allegations in the County's complaint meet the requirements for standing under RICO's civil suit provision, 18 U.S.C. § 1964(c). We discuss first whether the County has alleged the requisite type of injury, then whether the defendants' alleged RICO violations could have proximately caused the County's injury.

I. Canyon County Has Failed to Allege that It Has Been Injured in Its Business or Property

[2] To determine whether a plaintiff has sufficiently alleged that he has been "injured in his business or property," we must examine carefully the nature of the asserted harm. Our circuit requires that a plaintiff asserting injury to property allege "concrete financial loss." *Oscar v. Univ. Students Coop. Ass'n*, 965 F.2d 783, 785 (9th Cir. 1992) (en banc). Financial loss alone, however, is insufficient. "Without a harm to a specific business or property interest — a categorical inquiry typically determined by reference to state law — there is no injury to business or property within the meaning of RICO." *Diaz*

v. Gates, 420 F.3d 897, 900 (9th Cir. 2005) (enbanc), *cert. denied*, 546 U.S. 1131 (2006).

In this case, the County bases its RICO claims on the fact that "it has paid millions of dollars for health care services and criminal justice services for the illegal immigrants who have been employed [and/or harbored] by the defendants in violation of federal law." The County argues that it has sufficiently alleged that it has been injured in its property because it claims to have been forced to spend money. According to the County, "[a]ny involuntary expenditure of money is a loss of 'property.' " However, a government entity cannot rely on expenditures alone to establish civil RICO standing, and there is no indication that the County holds a property interest in the law enforcement or health care services that it provides to the public.

A. Government Expenditures Alone Are Insufficient to Qualify as Injury to Property

In the ordinary context of a commercial transaction, a consumer who has been overcharged can claim an injury to her

property, based on a wrongful deprivation of her money. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979) (interpreting provision of the Clayton Act that grants standing to "any person . . . . injured in his business or property" by an antitrust violation). As the Supreme Court reasoned in *Reiter*, "[i]n its dictionary definitions and in common usage 'property' comprehends anything of material value owned or possessed. Money, of course, is a form of property." *Id.* at 338 (citation omitted). Thus, the Court concluded that "where petitioner alleges a wrongful deprivation of her money because the price of the hearing aid she bought was artificially inflated . . . , she has alleged an injury in her 'property' . . . ." *Id.* at 342.

[3] Similarly, government entities that have been overcharged in commercial transactions and thus deprived of their money can claim injury to their property. *See Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906) (holding that city's claim that it was overcharged for its purchases of water pipe qualified as allegation that it was "injured in its property . . . by being led to pay more than the worth of the pipe"); *County of Oakland v. City of*

Detroit, 866 F.2d 839, 847 (6th Cir. 1989) (outlying counties "sustained an injury in their property when they paid the allegedly excessive charges" to Detroit for treatment and disposal of sewage).

[4] But the law commonly distinguishes between the status of a governmental entity acting to enforce the laws or promote the general welfare and that of a governmental entity acting as a consumer or other type of market participant. *See, e.g., Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601-02 (1982) (distinguishing between the sovereign, quasi-sovereign, and proprietary interests of governmental bodies). When a governmental body acts in its sovereign or quasi-sovereign capacity, seeking to enforce the laws or promote the public well-being, it cannot claim to have been "injured in [its] . . . property" for RICO purposes based solely on the fact that it has spent money in order to act governmentally. All government actions require the expenditure of money in this sense, insofar as the government acts through public servants who are paid for their services. If government expenditures alone sufficed as injury to property, any

RICO predicate act that provoked any sort of governmental response would provide the government entity with standing to sue under § 1964(c) — an interpretation of the statute that we think highly improbable. We find it particularly inappropriate to label a governmental entity "injured in its property" when it spends money on the provision of additional public services, given that those services are based on legislative mandates and are intended to further the public interest.

B. The County Does Not Have a Property Interest in Services It Provides to Enforce the Laws and Promote the Public Welfare

[5] As the County cannot satisfy the requirement of injury to a "specific property interest" based solely on its expenditure of money to provide public services, we must examine whether the County can claim a property interest in the services themselves. We conclude that the government does not possess a property interest in the law enforcement or health care services that it provides to the public; therefore, a

governmental entity is not "injured in its property" when greater demand causes it to provide additional public services of this type.

[6] We base this conclusion on several factors. First, the ordinary meaning of the term "property" does not include the interests of local governments in performing functions such as policing, caring for the indigent sick, and otherwise protecting the well-being of the public. Moreover, following *Diaz*'s instruction to determine whether the relevant state's law recognizes the alleged property interest, we see no indication that Idaho law creates a property-like entitlement in such services on the part of counties. *See Diaz*, 420 F.3d at 900. The County has made no showing that Idaho law grants counties a protectable legal interest in the public services they provide, and we have found none. The persuasive authority of other jurisdictions tilts against such an interest. *Cf. id.* (plaintiff's claim for lost wages due to false imprisonment alleged harm to a property interest, because California law recognizes the torts of intentional interference with contract and interference with prospective business relations); *see also Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 364

(9th Cir.2005) (plaintiff's claim alleging diminished litigation settlement due to the defendant's fraud alleged injury to a property interest, because fraudulent inducement is an actionable tort under Hawaii law), *cert. denied*, 126 S. Ct. 2861 (2006).

[7] Second, the Supreme Court has interpreted the statutory provision that served as a model for § 1964(c) to exclude claims for damages to governments' non-proprietary interests. The civil enforcement provision of the antitrust laws, § 4 of the Clayton Act, provides a private right of action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." 15 U.S.C. § 15(a). Because Congress based the RICO private right of action on § 4, courts have often, though not invariably, interpreted the two statutory provisions in a like manner. *See, e.g., Holmes*, 503 U.S. at 267-68; *Sedima*, 473 U.S. at 489, 498-99. Interpreting the Clayton Act, the Court has read the phrase "injured in his business or property" to encompass only injury to a state's "commercial interests," meaning "the interests of the [state] as a party to a commercial transaction." *Reiter*, 442 U.S. at

341-42. If a similar interpretation of the identical phrase is applied in the RICO setting, a government's claim for its law enforcement and health care expenditures would not qualify as injury to property.

In *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), the State of Hawaii sued four petroleum suppliers for antitrust violations. Hawaii raised claims in three capacities: a claim in the state's proprietary capacity for overcharges it paid directly as a consumer of petroleum products; a claim in its parens patriae capacity as a representative of the state's citizens; and a class action claim on behalf of all consumers in the state. *Id.* at 253-56. To support the claims brought in the state's parens patriae capacity, Hawaii alleged various harms, including loss of its citizens' revenues, increases in taxes as a result of lost revenues, lost opportunities in commerce, and frustration of state measures to promote its citizens' welfare. *Id.* at 255. The Court held that the state, acting in a parens patriae capacity to redress injury to its general economy, had not been injured in its property and thus lacked standing to recover damages under § 4 of the Clayton Act. The Court stated:

> Like the lower courts that have considered the meaning of the words 'business or property,' we conclude that they refer to commercial interests or enterprises. When the State seeks damages for injuries to its commercial interests, it may sue under § 4. But where, as here, the State seeks damages for other injuries, it is not properly within the Clayton Act.

Id. at 264 (citations omitted).

The Court also relied on 15 U.S.C. § 15a, an adjacent provision permitting the federal government to recover damages whenever "injured in its business or property" by an antitrust violation. That provision, the Court wrote, did not permit the United States to "recover for economic injuries to its sovereign interests, as opposed to its proprietary functions." *Id.* at 265. Similarly, the Court held, "[§] 4, which uses identical language, does not authorize recovery for economic injuries to the sovereign interests of a State." *Id.*

Later, in *Reiter*, the Court clarified that states could claim to have been injured in their property when alleging harm to their interests as consumers, despite the reference in *Hawaii* to the state's "commercial interests":

> The phrase 'commercial interests' was used [in *Hawaii*] as a generic reference to the interests of the State of Hawaii as a party to a commercial transaction. This is apparent from *Hawaii*'s explicit reaffirmance of the rule of *Chattanooga Foundry* and statement that, where injury to a state 'occurs in its capacity as a consumer in the marketplace' through a 'payment of money wrongfully induced,' treble damages are recoverable by a state under the Clayton Act.

Reiter, 442 U.S. at 341-42.

[8] As used in the Clayton Act's private right of action, then, the phrase "business or property" excludes states' interests in their sovereign or quasi-sovereign

capacities, but does include states' interests as ordinary marketplace actors. We believe that this interpretation of the phrase "business or property" should apply in the context of a civil RICO claim, as well.

The Second Circuit has already applied *Hawaii* and *Reiter* in this way. In *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 103-04 (2d Cir. 1990), the court considered a town's civil RICO claims against abortion protesters who had demonstrated for two days at a local clinic. According to the town, the protesters' activities amounted to extortion against the town under the Hobbs Act and thus were a pattern of racketeering activity. *Id.* at 95-98. The town alleged that the protesters had limited the police department's ability to respond to other public safety needs, and caused extraordinary police overtime wage expenses, among other harms, all of which amounted to "injury to the governmental functions and property" of the town. *Id.* at 95-96.

The court first concluded that extortion under the Hobbs Act required the "obtaining of property from another by wrongful means" and that neither "altered official conduct" nor

overtime police expense qualified as property for this purpose. *Id.* at 101-02 (internal quotation marks omitted). Therefore, the town had failed properly to allege any RICO predicate acts and there was "no plausible basis for... assertion" of the RICO claim. *Id.* at 102-03. The court then analyzed whether the town had alleged injury to its "business or property" resulting from the RICO violation, as required for civil RICO standing. Relying on *Hawaii* and *Reiter* for the proposition that a governmental entity may "recover for such injury only when it functions 'as a party to a commercial transaction,'" the Second Circuit held that "[i]njuries of the sort asserted by the Town do not fall within the ambit of section 1964(c)." *Id.* at 104.

Thus, the Second Circuit held that the town's claimed injuries stemming from the burden the protesters placed on the town's police department — which included expenditures for increased overtime costs — did not qualify as injury to the town's business or property. Rather, these were injuries to the town's sovereign or quasi-

sovereign interests of the sort held non-compensable in *Hawaii*.[9]

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[9]Although the Second Circuit's interpretation of "business or property" for RICO standing purposes in *Town of West Hartford* has been characterized as dicta, lower courts have relied on it in several instances. *See Attorney Gen. v. R.J. Reynolds Tobacco Holdings, Inc.*, 103 F. Supp. 2d 134, 151-55 (N.D.N.Y. 2000) (holding that "*Town of West Hartford* compels the Court to conclude that [increased law enforcement] costs do not constitute a cognizable RICO injury to Canada as a party to a commercial transaction"), *aff'd on other grounds*, 268 F.3d 103 (2d Cir. 2001); *City of New York v. JAM Consultants, Inc.*, 889 F. Supp. 103, 105 (S.D.N.Y. 1995) (holding that city's relationship with its employees is a "commercial relationship" under *Town of West Hartford*, and thus inducement of disloyal employee conduct injures city in its property interests for purposes of RICO standing); *Town of Brookline v. Operation Rescue*, 762 F. Supp. 1521, 1523 (D. Mass. 1991) (holding that town could not establish that it had been injured in its business or property based on increased expenses resulting from abortion protests). *But see City of New York v. Cyco.Net, Inc.*, 383 F. Supp. 2d 526, 555-56 (S.D.N.Y. 2005) (characterizing the law as "unsettled" following *Town of West Hartford* and holding that city's loss of its right to collect sales taxes may qualify as injury to its business or property); *Eur. Cmty. v. RJR Nabisco, Inc.*, 150 F. Supp. 2d 456, 492- 93 (E.D.N.Y. 2001)

[9] The injuries claimed by the County in this case, increased expenditures for law enforcement and health care services, are analogous to those that the Second Circuit ruled non-compensable in *Town of West Hartford*. The County sustained these injuries in its sovereign and/or quasi-sovereign capacities, and may not claim the costs as damages to its property for purposes of civil RICO standing.

We note finally that the common law doctrine barring government recovery of the costs of public safety services in tort supports our holding. The rationale underlying the "municipal cost recovery rule" is twofold: (1) that there is little reason for courts to use tort law to unsettle expectations and disrupt the existing, tax-payer funded system of providing public safety services; and (2) that it is not the courts' role to disturb the legislature's decision to fund such services as a part of its overall fiscal policy choices. *See City of Flagstaff*, 719 F.2d at 323-24. A

(concluding that foreign government's claim for lost tax revenues and increased law enforcement costs "are, at bottom, claims for lost money" and thus qualify as property for RICO standing purposes).

number of courts have applied this rule to bar recovery by local governments of public safety expenses.[10]

In this instance, we are not dealing with state common law, but with a statutory cause of action created by Congress. Therefore, we are not concerned that our court might upset the local legislative body's fiscal policy by allowing recovery for public safety services. Instead, the question is one of Congress' intent, specifically whether Congress meant to disrupt settled expectations and alter the legislatively-chosen system of funding local government services. We recognize that

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[10]*See, e.g., District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1080 (D.C. Cir. 1984); *County of San Luis Obispo v. Abalone Alliance*, 223 Cal. Rptr. 846, 850-52 (Ct. App. 1986); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1144-47 (Ill. 2004); *City of Bridgeton v. B.P. Oil, Inc.*, 369 A.2d 49, 54 (N.J. Super. Ct. 1976); *Koch v. Consol. Edison Co.*, 468 N.E.2d 1, 7-8 (N.Y. 1984). *But cf. White v. Smith & Wesson Corp.*, 97 F. Supp. 2d 816, 821-23 (N.D. Ohio 2000); *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1242-44 (Ind. 2003); *James v. Arms Tech., Inc.*, 820 A.2d 27, 48-49 (N.J. Super. Ct. 2003); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1149-50 (Ohio 2002).

Congress could have used its powers to do so, enabling local governments to pursue treble damages under RICO for injuries arising from their provision of governmental services. But had Congress intended such a result, we believe that Congress would have been more explicit; the term "business or property" does not readily connote a government's interest in the services it provides in its sovereign or quasi-sovereign capacity.[11] As we think it unlikely that Congress intended this type of recovery under RICO, and because Idaho's legislature has assigned the fiscal burden for law enforcement and health care services differently, it is not our place to disturb these decisions.

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[11]There is no legislative history regarding Congress' intent in this regard. *Cf. Sedima*, 473 U.S. at 495 n.13 (referring to what lower court described as the " 'clanging silence' of the legislative history" of § 1964(c) regarding the provision's scope); *see also Reiter*, 442 U.S. at 343 ("Many courts and commentators have observed that the respective legislative histories of § 4 of the Clayton Act and § 7 of the Sherman Act, its predecessor, shed no light on Congress' original understanding of the terms 'business or property.' ").

Contrary to the County's argument, in holding that the costs of their law enforcement and public health care services are not recoverable damages under civil RICO, we are not inserting an additional injury requirement into § 1964(c). Rather, our holding is based on the statutory language itself. We simply do not think that the term "business or property" can be interpreted to encompass the sorts of interests that the County relies on in this case.

[10] In light of the foregoing reasoning, we conclude that the County lacks RICO standing and cannot bring suit under RICO for the injuries that it asserts in its complaint.

II. Canyon County Cannot Show That the Alleged RICO Violations Proximately Caused Its Injuries

Even if the County's claimed injuries were cognizable under § 1964(c) as injuries to property, the County's complaint is flawed in another critical aspect: most of the defendants' alleged RICO violations do not bear a direct connection to the County's asserted harms. *See Anza*, 126 S. Ct. at 1998

("When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries.").

A. The County's Claims Against the Defendant Companies

Canyon County alleges that it "has paid millions of dollars for health care services and criminal justice services for the illegal immigrants who have been employed by the defendants in violation of federal law." We conclude that the County cannot, as a matter of law, show an adequate causal nexus between the four defendant companies' employment of undocumented workers and the financial harm the County claims to have suffered.

[11] A "showing that the defendant violated § 1962, the plaintiff was injured, and the defendant's violation was a 'but for' cause of plaintiff's injury" is insufficient to meet the requirement in § 1964(c) that the plaintiff's injury be "by reason of" the RICO violation. *Holmes*, 503 U.S. at 265-66. Rather, a plaintiff must also show that the defendant's

RICO violation proximately caused her injury. *Id.* at 268. Proximate causation requires "some direct relation between the injury asserted and the injurious conduct alleged." *Id.*

In *Holmes*, the Court applied the proximate cause requirement to preclude a RICO suit by a plaintiff whose injury was entirely contingent on the injury of direct victims. *Id.* at 271-74. In that case, a number of conspirators had allegedly engaged in a fraudulent stock manipulation scheme which led to the insolvency of two securities broker-dealers. As a result of the insolvency, the broker-dealers could no longer meet their obligations to their customers, and the plaintiff, the Securities Investor Protection Corporation ("SIPC"), was forced to cover the broker-dealers' debts. *Id.* at 262-63. SIPC asserted the broker-dealers' customers' claims against the conspirators, arguing that the customers had been injured "by reason of" the conspirators' fraudulent scheme in violation of RICO. The Court disagreed, noting that "the conspirators have allegedly injured these customers only insofar as the stock manipulation first injured the broker-dealers and left them without the

wherewithal to pay customers' claims." *Id.* at 271. Finding "the link . . . too remote between the stock manipulation alleged and the customers' harm, being purely contingent on the harm suffered by the broker-dealers," the Court concluded that proximate causation was lacking. *Id.*

[12] Subsequently, in *Anza*, the Supreme Court clarified that the *Holmes* proximate cause requirement not only bars RICO suits by derivative victims, or those whose injuries are "purely contingent on the harm suffered by" direct victims, but generally precludes recovery by those whose injuries are only tenuously related to the RICO violation at issue. 126 S. Ct. at 1996. Under *Anza*, courts must scrutinize the causal link between the RICO violation and the injury, identifying with precision both the nature of the violation and the cause of the injury to the plaintiff. *See id.* at 1996-98. Where the violation is not itself the immediate cause of the plaintiff's injury, proximate cause may be lacking.

In *Anza*, Ideal Steel Supply Company sued its competitor, alleging that the competitor had violated RICO by conducting its business through a pattern of defrauding

the State of New York of sales tax payments. *Id.* at 1994. According to Ideal, the defendant was able to undersell Ideal by not charging sales tax on cash purchases, and thus deprived Ideal of sales it otherwise would have made. *Id.* at 1994-95, 1997. The Court concluded, however, that the competitor's alleged violations could not have proximately caused Ideal's injuries, because "[t]he cause of Ideal's asserted harms . . . is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)." *Id.* at 1997.

In support of this conclusion, the Court discussed the rationale for the requirement that the plaintiff's harm directly result from the alleged RICO violation. *Id.* (citing *Holmes*, 503 U.S. at 269-270). First, the Court cited "the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action." *Id.* The Court emphasized the attenuated causal chain between the defendant's tax fraud and the plaintiff's loss of sales. It noted the difficulty of determining whether the defendant's lower prices were in fact based on the defendant's fraudulent failure to pay sales tax, or whether other causes determined the

defendant's pricing. *Id.* The Court also pointed out that the plaintiff's lost sales could have resulted from a host of factors other than its competitor's fraud. *Id.*

Second, the Court discussed "the speculative nature of the proceedings that would follow if Ideal were permitted to maintain its claim." *Id.* at 1998. A court would have to determine the portion of Ideal's damages resulting from the RICO violation, by evaluating the relative causal role of the defendant's fraud in lowering the defendant's prices, and the relative causal role of those lowered prices in diminishing Ideal's sales — in effect, requiring a complex apportionment of fault among various causes. *Id.* The proximate causation requirement "is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation." *Id.*

Finally, the Court referenced the consideration of whether "the immediate victims of an alleged RICO violation can be expected to vindicate the laws by pursuing their own claims." *Id.* In the case before the Court, the State of New York could be expected to pursue its own remedies for the

fraud practiced upon it by the defendant. Thus, the Court found "no need to broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly." *Id.*

[13] Under *Anza*, we must determine whether the County meets the proximate cause requirement by examining "whether the alleged violation led directly to the plaintiff's injuries." *Id.*[12] The basis of the RICO violation, according to the County's complaint, is the defendant companies' knowing hiring of undocumented immigrants.

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[12]We are mindful that, in evaluating a complaint's adequacy at the motion to dismiss stage, we must "presume that general allegations embrace those specific facts . . . necessary to support the claim." *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 615 (6th Cir. 2004) (quoting *Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 256 (1994), in support of the proposition that "a weak or insubstantial causal link" is not a good basis for dismissal on the pleadings). *Anza* itself, however, dealt with the adequacy of the proximate cause allegations at the motion to dismiss stage. 126 S. Ct. at 1994. It is therefore evident that courts need not allow RICO plaintiffs leeway to continue on with their case in an attempt to prove an entirely remote causal link.

The alleged harm is the County's increased expenditures on health care and criminal justice services. Here, just as in *Anza*, the cause of the plaintiff's asserted harms is a set of actions (increased demand by people within Canyon County for public health care and law enforcement services) entirely distinct from the alleged RICO violation (the defendants' knowing hiring of undocumented workers).

[14] The three rationales for the proximate cause requirement described in *Anza* also suggest that the County's harm fails the proximate cause test. *Cf. id.* at 1997. As to the first consideration, the difficulty of assessing causation, the asserted causal chain in this instance is quite attenuated, and there are numerous other factors that could lead to higher expenditures by the County. In fact, it is not clear how the companies' hiring of undocumented immigrants would increase demand for health care and law enforcement within Canyon County. Further, holding employers liable for the actions of their employees that are not even recognized as being a basis for respondent superior liability would be

contrary to centuries of precedent concerning proximate causation.

[15] The causal chain would also be difficult to ascertain because there are numerous alternative causes that might be the actual source or sources of the County's alleged harm. Increased demand for public health care and law enforcement may result from such varied factors as: demographic changes; alterations in criminal laws or policy; changes in public health practices; shifts in economic variables such as wages, insurance coverage, and unemployment; and improved community education and outreach by government.

[16] Second, the proceedings required to evaluate the County's injury would be speculative in the extreme, perhaps more so than those discussed in *Anza*. *Cf. id.* at 1998. A court would be forced to evaluate the extent to which the companies' illegal hiring practices had created increased demand for County services. This would not consist of simply estimating the number of undocumented immigrants employed by the companies and their average usage of County services.Rather, the court would have to

construct the alternative scenario of what would have occurred had the companies employed legally authorized workers, and determine how this might have affected the County's total population, and how these alternative workers might have differed from the undocumented workers in their consumption of County services, if at all. This would be an "intricate, uncertain" inquiry of the type that the *Anza* Court warned against. *Id.*

Given the substantial — and fatal — shortcomings of the complaint in meeting *Anza*'s proximate cause requiremets, we need not inquire into the question of whether there are more immediate victims of the defendants' alleged RICO violations who are likely to sue. *See Newcal Indus., Inc. v. IKON Office Solution*, 2008 WL 185520, at *13 (9th Cir. 2008).[13]

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[13]We note that under *Anza*, the likelihood of more direct victims bringing suit is not essential to a finding of no proximate cause. *See Anza*, 126 S. Ct. at 1998 (noting that "[t]he requirement of a direct causal connection is *especially warranted* where the immediate victim of an alleged RICO violation can be expected to vindicate the laws by pressing their own claims") (emphasis added).

The County has attempted to limit *Anza*'s reach, characterizing the holding as applying only to "derivatively injured plaintiffs." Because the County's injury is not "derivative of an injury suffered by any other party," the County asserts that *Anza* is inapplicable.

We are, however, unpersuaded by the County's attempt to distinguish *Anza* as a "derivative or passed-on" injury case. It is true that the Court in *Holmes* dealt with derivative injury, in the sense that any harm to the plaintiff occurred only to the extent that a direct victim's injuries were "passed on," or flowed through another victim. But there was no such "passed-on" harm in *Anza*: the plaintiff alleged that it lost business due to the defendant's lowered prices, a harm which was distinct from and not contingent on the harm suffered by the state due to the defendant's sales tax fraud. Thus, *Anza* applies fully to cases like this one, where the harm to the plaintiff from the defendant's RICO violation does not flow through any intervening victims.

[17] The County's claims against the defendant companies fail for lack of

proximate causation. The asserted link between the companies' hiring practices and increased demand for County services is far too attenuated.

B. The County's Claim Against Pacheco

The County's claim against Albert Pacheco, the former Executive Director of the Idaho Migrant Council, is founded on two specific factual allegations: first, that Pacheco directed his staff to assist undocumented immigrants in filing false applications for the County's indigent medical assistance fund, which cost the County money; and second, that Pacheco directed his staff to assist undocumented immigrants in procuring public housing, and that those immigrants subsequently burdened the County's public assistance and criminal justice systems. As we noted above, neither of these allegations supports a claim that the County was injured in its "property," and so the claim against Pacheco was properly dismissed for that reason. The second allegation against Pacheco, that he assisted immigrants in securing housing, suffers from an additional flaw: lack of proximate causation.

Here, as in *Anza*, the defendant's alleged RICO violation (assisting undocumented immigrants in securing housing) is distinct from the cause of the plaintiff's harm (increased demand placing a burden on Canyon County's public assistance and criminal justice systems). Further, the considerations cited in Anza demonstrate that proximate cause is absent. *See id.* at 1997-98. The causal chain between the RICO violation and the plaintiff's harm is dubious for any number of reasons: for example, the immigrants might have secured public housing without Pacheco's staff's assistance, and the immigrants might have remained in the County even without being able to occupy public housing. It is even more attenuated to postulate that having the benefit of public housing made the immigrants more prone to commit crimes, require health care, or otherwise increase their use of County services. Given the speculative nature of the causal links between the alleged harm and Pacheco's actions, a court attempting to identify the specific portion of the County's financial loss caused by Pacheco's actions would be sorely pressed to do so. Finally, to the extent that Pacheco's actions were indeed

unlawful, the most direct victim is the public housing authority itself; there is little need to allow the County to pursue this RICO claim in order to vindicate the laws.

[18] Thus, we conclude that proximate causation is lacking as to this portion of the County's claim against Pacheco.

CONCLUSION

We conclude that the County lacks statutory standing under 18 U.S.C. § 1964(c) to proceed with its federal RICO claims against the four defendant companies. First, the County has failed to plead that it has been "injured in [its] business or property" by reason of the defendants' alleged RICO violations. Second, the County cannot show that its claimed injuries were proximately caused "by reason of" the defendant companies' alleged RICO violations.

As for the County's claim against the individual defendant, Pacheco, the County lacks standing to pursue this claim as well: the County has not pled injury to its business or property, and proximate causation is

lacking as to at least a portion of Pacheco's alleged RICO violations.

As a consequence, the judgment of the district court dismissing the County's federal RICO claims is **AFFIRMED.**

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CANYON COUNTY,	)	
	)	
Plaintiff,	)	Case No. CV05-306-S-EJL
	)	
	)	
vs.	)	MEMORANDUM
	)	DECISION
	)	AND ORDER
	)	
SYNGENTA SEEDS, INC., et al.,	)	
	)	
	)	
	)	
Defendants.	)	

_____)

Plaintiff Canyon County brings this action pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, against Defendants Syngenta Seeds, Inc. ("Syngenta"), Sorrento Lactalis, Inc. ("Sorrento"), Swift Beef Company ("Swift"), Harris Moran Seed Co. ("Harris"), and Albert Pacheco ("Pacheco") (collectively the "Defendants"),[1] seeking to recover "damages it [allegedly] has suffered as a direct result of the knowing employment of large numbers of illegal immigrants by the defendants." (Am. Compl. ¶ 1). Defendants have moved to dismiss Canyon Canyon's Amended Complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) and for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). The motions are now ripe. Having fully reviewed the record, the Court finds that the facts and legal

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[1] Canyon County also originally named the Idaho Migrant Council, Inc., as defendant but later dismissed this party by filing a Notice of Voluntary Dismissal pursuant to Federal Rule Civil Procedure 41(a)(1). (Docket no. 21).

arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, this matter shall be decided on the record before this Court without a hearing.

Standards

On a motion to dismiss, the Court's review is generally limited to the contents of the complaint. Warshaw v. Xoma Corp., 74 F.3d 955, 957 (9th Cir.1996). The Court must "take as true all allegations of material fact stated in the complaint and construe them in the light most favorable to the nonmoving party." Id. "The Court is not required, however, to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. Lord v. Swire Pacific Holdings, Inc., 203 F. Supp.2d 1175, 1178 (D. Idaho 2002) (citing Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir.1994)). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. See

Morley v. Walker, 175 F.3d 756, 759 (9th Cir. 1999).

Discussion

With respect to Defendants Syngenta, Sorrento, Swift and Harris, Canyon County alleges in its one-count Amended Complaint that these Defendants have engaged in an Illegal Immigrant Hiring Scheme that includes violations of the Immigration and Nationality Act. Specifically, Canyon County alleges that these Defendants have entered into association-in-fact enterprises for the purpose of obtaining and employing illegal immigrant workers to reduce labor costs. With regard to Defendant Pacheco, Canyon County alleges that he has formulated a "Policy of Willful Blindness and Harboring" for the purpose of falsely obtaining medical and housing assistance for illegal immigrants, in violation of federal law. Canyon County contends that the alleged actions of all these Defendants constitute illegal racketeering activity which has harmed Canyon County "because it has been forced to spend money to provide medical and criminal justice services for many of these illegal immigrants."(Am. Compl. ¶ 26; see also Am. Compl. ¶¶ 32, 41, 43 & 46). In

accordance with RICO, Canyon County prays for relief "in an amount triple the damages each [Defendant] has caused Canyon County through its or his racketeering activity." (Am. Compl. ¶ 52).

A violation of § 1962(c) of RICO, the provision upon which Canyon County relies, "requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985). Furthermore, a RICO plaintiff must allege a direct causal link between the injury and the defendant's violation. Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268-69 (1992). Defendants contend that Canyon County has failed to adequately allege any of these RICO requirements and that therefore the Amended Complaint should be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

In addition to the RICO elements set forth above, the RICO "plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." Sedima,, 473 U.S. at 496. This limitation flows from § 1964(c) which confers standing to bring civil RICO claims only upon

those persons "injured in [their] business or property by reason of a violation of section 1962." Citing this statutory language, Defendants also challenge Canyon County's standing and move to dismiss the Amended Complaint pursuant to the applicable Federal Rule.[2] Because standing presents a threshold question, the Court will address this issue first and determine whether Canyon County is authorized by RICO to bring its claim against Defendants. Bruce v. U.S., 759 F.2d 755, 757-58 (9th Cir. 1985) (explaining that question of statutory standing may bear on court's jurisdiction); Moore v. PaineWebber,

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[2] As several of the Defendants note, the case law is unclear as to whether a challenge to a plaintiff's standing under RICO is jurisdictional and/or whether such a challenge should be brought pursuant to Rule 12(b)(1) or Rule 12(b)(6) of the Federal Rules of Civil Procedure. Lerner v. Fleet Bank, N.A., 318 F.3d 113, 126 (2nd Cir. 2003) (discussing case law on this issue in context of supplemental jurisdiction). The distinction does not matter here, as the Court applies the same standards under either Rule 12(b)(1) or Rule 12(b)(6), see Moore v. PaineWebber, Inc., 189 F.3d 165, 169 n. 3 (2nd Cir.1999), and each Defendant has moved to dismiss the Amended Complaint based on Canyon County's lack of standing under § 1964(c).

Inc., 189 F.3d 165, 169 n. 3 (2d Cir.1999) (same in RICO context).

In asserting a bar to Canyon County's standing, Defendants first cite what is known as the "municipal cost recovery rule." As discussed in detail by the Ninth Circuit in City of Flagstaff v. Atchison, Topeka & Santa Fe, 719 F.2d 322 (9th Cir.1983), this doctrine stands for the proposition "that the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service."Id. at 323. This concept, the Ninth Circuit said, is a product of state and federal common law and "does not turn on the underlying theory of the tort for it is the identity of the claimant and the nature of the cost that combine to deny recovery." Id. at 324. As the Ninth Circuit explained, the reason for the municipal cost recovery bar is "[i]f the government has chosen to bear the cost for reasons of economic efficiency, or even as a subsidy to the citizens and their business, the decision implicates fiscal policy: the legislature and its public deliberative processes, rather than the court, is the appropriate forum to address such fiscal concerns." Id. However, the Ninth Circuit

acknowledged several exceptions to the municipal cost recovery rule that may permit a governmental entity to "recover the cost of its services." Id.

Canyon County appears to concede the existence of the municipal cost recovery rule, (Resp. 3, 11-12), and it admits that its lawsuit is "for the costs of municipal services,"[3] (id. at 5), but argues that it fits within two of the exceptions articulated by the Ninth Circuit in City of Flagstaff. Pointing to the first exception, Canyon County recites the City of Flagstaff statement that "[r]ecovery has also been allowed where the acts of a private party create a public nuisance which the government seeks to abate." City of Flagstaff, 719 F.2d at 324. And then it turns to a 1907 case of the Idaho Supreme Court, which according to Canyon County defines a public nuisance to include any criminal conduct. (Resp. 3, 11-12 (citing J.B. Mullen & Co. v. Mosley, 90 P. 986, 990 (Idaho 1907)). Reading the two cases together, Canyon County argues that its

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[3] The Court may treat representations of counsel in a brief as an admission. American Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 226-27 (9th Cir. 1988).

RICO action for damages based on alleged criminal activity fits under the public nuisance exception to the municipal cost recovery rule.

There are several problems with Canyon County's analysis. First, the definition of a public nuisance has been modified by the Idaho legislature and the current statutory provision has not been interpreted to include criminal conduct. IDAHO CODE § 52-101. To the contrary, the statutory language *does not* specifically identify criminal conduct as a public nuisance.[4] If the Idaho legislature intended to incorporate the Idaho Supreme Court's discussion from the 1907 Mosley case into § 52-101 it would have done so expressly, and it did not. It is telling that Canyon County failed to bring this most recent statutory provision to the Court's attention.

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[4] Section 52-101 provides that: Anything which is injurious to health or morals, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

Second, Canyon County is not bringing a public nuisance lawsuit, it is a plaintiff in a federal RICO civil action. Consequently, it is not acting in its governmental capacity but instead as a private party to a civil lawsuit. Sedima, 473 U.S. at 483-87 (explaining that § 1962 of RICO provides a civil action for private suits). Because of that, Canyon County is not attempting to "abate" any activity but only seeks to recover monetary damages. City of Philadelphia v. Beretta U.S.A. Corp., 126 F. Supp.2d 882, 894-95 (E.D. Pa. 2000) (explaining that the City cannot have it both ways; it is either suing in its "governmental capacity to abate a public nuisance" or "[i]f it sues for costs it has itself incurred . . . the action is barred under the municipal cost recovery rule"). If Canyon County was granted all the relief it requested it would do nothing to stop or "abate" the Defendants' alleged criminal conduct.[5] For

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[5] In its prayer for relief, Canyon County does request an injunction prohibiting Defendant Pacheco from further participation with Idaho Migrant Council or any other organization which seeks payments from Canyon County. But even if granted, the injunction would not otherwise prevent Defendant Pacheco from continuing his alleged wrongful conduct.

all these reasons, the Court concludes that the RICO action by Canyon County is not within the public nuisance exception to the City of Flagstaff municipal cost recovery rule. See 719 F.2d at 323-24.

Canyon County also argues that it fits within a second City of Flagstaff exception that permits recovery of municipal cost "where it is authorized by statute." 719 F.2d at 324. Although not expressly articulated, Canyon County appears to contend that § 1964(c) of RICO, which allows persons "injured in business or property" to bring a RICO civil action, is authority for a municipal cost recovery suit rather than a bar to such an action as Defendants assert. The merits, then, of each party's respective position turns on the proper interpretation of the language from § 1964(c) that authorizes a civil lawsuit under RICO by a person "injured in business or property."[6] In support of its position,

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[6] Indeed, the proper interpretation of § 1964(c) is determinative on the standing issue. If § 1964(c) permits a municipality to sue under RICO to "recover the cost of its services," then this lawsuit is not barred by the municipal cost recovery rule. City of Flagstaff, 719 F.2d at 324. If, on the other hand, § 1964(c) does not afford standing for recovery of municipal cost this action is subject to dismissal

Defendants offer extensive analysis with

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without reference to the municipal cost recovery rule. See, e.g., Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 103 F. Supp.2d 134, 154 (N.D. N.Y. 2000). The Court's discussion of the municipal cost recovery rule is important, however, not only because it tracks the parties' briefing but because, as City of Flagstaff indicated, the rule is a product of state and federal common law. 719 F.2d at 323-24 (citing both state and federal case law). The Ninth Circuit has stated that the term "property" in § 1964(c) is typically determined by reference to state law. Diaz v. Gates, 420 F3d 897, 899 (9th Cir. 2005) (en banc) (explaining that under § 1964(c) "we typically look to state law to determine 'whether a particular interest amounts to property'"). Both City of Flagstaff and Idaho case law strongly suggest that a non-contractual interest in reimbursement for governmental services is not a recognized property right. See City of Grangeville v. Haskin, 777 P.2d 1208, 1211-12 (Idaho 1989) (holding that a city's effort to collect charges for water, sewer and garbage services "even though the services were not ordered, contracted for, or used" by the person is not permitted under Idaho law). Moreover, "[s]tatutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." Kasza v. Browner, 133 F.3d 1159, 1167 (9th Cir.1998) (quoting United States v. Texas, 507 U.S. 529, 534 (1993)).

citations to numerous cases that the Court will discuss below.

Defendants concede that on this issue there is no binding precedent from either the Ninth Circuit or the United States Supreme Court. Accordingly, Defendants point to persuasive case law. In this regard, Defendants first observe that the "injured in business or property" requirement of § 1964(c) has been determined to have "restrictive significance." See, e.g., Oscar v. Univ. Students Co-op. Ass'n, 965 F.2d 783, 786 (9th Cir.1992). Thus, "it is well-established that not all injuries are compensable under this section." Id. at 785. For example, "personal injuries are not compensable under RICO." Id.; see also Diaz v. Gates, 420 F3d 897, 899 (9th Cir. 2005) (en banc) ("Without a harm to a specific business or property interest . . . there is no injury to business or property within the meaning of RICO."); Imagineering, Inc. v. Kiewit Pac. Co., 976 F.2d 1303, 1310 (9th Cir.1992) (stating that "[c]ase law in our circuit limits injuries compensable under RICO" and that a "showing of 'injury' requires proof of concrete financial loss").

In an effort to answer the specific question before this Court, Defendants note

that because the language of § 1964(c) is based on the "quite similar" language of the Clayton Act, courts generally have turned to the interpretation of the Clayton Act's standing provision in order to construe the intended effect of § 1964(c). See, e.g., Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1168 (9th Cir. 2002) (noting the similarity between RICO's standing provision, § 1964(c), and the standing provision of the Clayton Act, 15 U.S.C. § 15(a), which grants standing to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws"). As the United States Supreme Court explained "both statutes aim to compensate the same type of injury; each requires that a plaintiff show injury 'in his business or property by reason of' a violation." Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 151 (1987). Furthermore, the "close similarity of the two provisions is no accident . . . .[t]he 'clearest current' in the legislative history of RICO 'is the reliance on the Clayton Act model.'" Id.

Consequently, the Ninth Circuit has stated that the two standing provisions should be "interpreted in tandem." Mendoza, 301 F.3d at 1168. In light of this directive it

is most significant that the United States Supreme Court has interpreted the Clayton Act's standing provision to exclude recovery for the cost of public services. In the case Hawaii v. Standard Oil Co. of California, 405 U.S. 251 (1972), the Supreme Court construed the Clayton Act's standing provision, "which limits . . . recovery to damages to 'business or property,' " as authorizing recovery "not for general injury . . . or to the Government's ability to carry out its functions, but only for those injuries suffered in its capacity as a consumer of goods and services." Id. at 264-65. The Supreme Court elaborated further on this issue in the case Reiter v. Sonotone Corp., 442 U.S. 330 (1979), where it stated that a governmental entity suffers an injury to "business or property" when it is harmed "as a party to a commercial transaction." Id. at 341-42.

Given this Supreme Court precedent, it is not surprising that the only circuit court to address this same standing issue in the context of a RICO action has reasoned that § 1964(c) does not permit a municipality to recover for alleged injuries to its governmental function. In Town of West Hartford v. Operation Rescue, 915 F.2d 92

(2nd Cir.1990), the Second Circuit relied on both Hawaii and Reiter to conclude that the type of recovery that Canyon County seeks here is for "[i]njuries of the sort [that] do not fall within the ambit of section 1964(c)." Id. at 103-04 & n.2.

Although the Town of West Hartford discussion is dicta,[7] the majority of district courts to have considered the issue have applied the reasoning of Town of West Hartford to deny municipal cost recovery under § 1964(c). See, e.g., Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 103 F. Supp.2d 134, 154 (N.D. N.Y. 2000) ("In short, Town of West Hartford requires injury to the government's commercial interests in RICO claims."); City of New York v. JAM Consultants, Inc., 889 F. Supp. 103, 105 (S.D. N.Y.1995) ("[T]he Second Circuit has held that where a municipality sues under RICO, it must allege injury to its business or property in its capacity 'as a party to a commercial transaction.' Allegations that a municipality

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[7] See Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 132 n.40 (2d Cir. 2001).

is seeking to vindicate its interests in the 'general economy' or in its 'ability to carry out its functions' do not state a claim under RICO."); Town of Brookline v. Operation Rescue, 762 F. Supp. 1521, 1523 (D. Mass.1991) (stating the court is "persuaded that the Second Circuit is correct in concluding that upon these facts, a plaintiff town cannot establish . . . the requirement of 18 U.S.C. § 1964(c) that it has been 'injured in [its] business or property by reason of a violation of section 1962,' as required of a civil RICO plaintiff"). But see European Community v. RJR Nabisco, Inc., 150 F. Supp.2d 456, 497 (E.D. N.Y. 2001) (stating in dicta that it rejects Town of West Hartford).

In response to this extensive persuasive authority, Canyon County answers with one sentence and a footnote. In relevant part, Canyon County responds that its claim against Defendants "is asserted under RICO, a federal statute, which is a 'legislative authority,' a basis recognized by the City of Flagstaff court for permitting municipalities to recover for their costs" and that "[s]ince recovery is permitted [by RICO], such [municipal] costs are a loss to the County's 'property' [under § 1964(c)]. See, e.g., County of Oakland v. City of Detroit, 866 F.2d 839,

847 (6th Cir. 1989)." (Resp. 12 & n. 8). At best, Canyon County's circular reasoning – that RICO authorizes the action and so its municipal costs are "property" for standing purposes under § 1964(c) – is "unhelpfully tautological." Sedima, 473 U.S. at 494. Moreover, the case cited by Canyon County actually highlights the fatal flaw in the present lawsuit. In County of Oakland the counties were suing under RICO to recoup the illegal overcharge they allegedly suffered as buyers under a contract. County of Oakland, 866 F.2d at 844-45. Consistent with the case law examined above, the counties were deemed to "have standing" under RICO *because* the counties "were the contracting parties" and "buyers" in a commercial transaction. Id. at 844. Unlike County of Oakland, Canyon County is not alleging its injuries flow from participation as a contracting party to a commercial transaction. Instead, by its own admission, it is asserting "claims for the costs of municipal services." (Resp. 5). This type of "general injury" to a county's "ability to carry out its functions" is not an injury to "business or property. " Hawaii, 405 U.S. at 264-65. Therefore, Canyon County does not have standing to bring this action under § 1964(c)

of RICO.[8] See, e.g., Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 103 F. Supp.2d 134, 154 (N.D. N.Y. 2000).

Summary and Conclusion

At common law, a governmental entity generally was not allowed to "recover the cost of its services" from a non-contracting party. City of Flagstaff, 719 F.2d at 323-24; City of Grangeville v. Haskin, 777 P.2d 1208, 1211-12 (Idaho 1989). "Statutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is

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[8] Although not relied upon in the standing context, Canyon County relies in general upon the Ninth Circuit case Mendoza v. Zirkle Fruit Co., 301 F.3d 1163 (9th Cir. 2002). The plaintiffs' standing in that case is easily distinguishable from the standing issue presented here. In Mendoza, the plaintiffs were deemed to have standing because their injuries, lost wages, were linked to an alleged "legal entitlement to business relations," something that Canyon County does not, and cannot, allege in this lawsuit. See 301 F.3d at 1168 n.4.

evident." Kasza v.Browner, 133 F.3d 1159, 1167 (9th Cir.1998) (quoting United States v. Texas, 507 U.S. 529, 534 (1993)). Section 1964(c) of RICO provides statutory standing to persons "injured in [their] business or property." The Ninth Circuit has determined that this language has "restrictive significance," Oscar, 965 F.2d at 786, and should be "interpreted in tandem" with the similar language found in the Clayton Act, Mendoza, 301 F.3d at 1168. The Supreme Court has construed the Clayton Act to preclude standing for recovery of cost associated with general governmental functions. Hawaii, 405 U.S. at 264-65; Reiter, 442 U.S. at 341-42. Consequently, the courts have reasoned that the same language in § 1964(c) of RICO bars a governmental entity from suing for the "costs of municipal services." See, e.g., Town of West Hartford, 915 F.2d at 103-04. Canyon County has not advanced any argument, case, or statutory interpretation to distinguish or challenge this analysis. Accordingly, the Defendants' motions to dismiss must be granted.[9]

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[9] Given the Court's ruling it is not necessary, or appropriate, to address the Defendants' additional arguments for dismissal. Dumas v. Major League

Because Canyon County's RICO action is predicated on recovery for the "costs of municipal services," it cannot cure this basic flaw in its pleading and therefore any further amendment to its Amended Complaint would be futile and will not be permitted. Chaset v. Fleer/Skybox Int'l, 300 F.3d 1083, 1087-88 (9th Cir. 2002) (denying plaintiff leave to amend where he lacked standing to sue under RICO). Although Canyon County asserts that it is bringing a "one-count Complaint," (Am. Compl. ¶ 10), in addition to its RICO claim it alleges that Defendant Pacheco's actions violate the Idaho Racketeering Act, (Am. Compl. ¶¶ 48-51). The Court's jurisdiction over any state law claim is supplemental in nature. 28 U.S.C. § 1367(a). Now that Canyon County's federal claims are to be dismissed, "the balance of factors... will point toward declining to exercise jurisdiction over the remaining state-law claims." Acri v. Varian Assoc., Inc., 114 F.3d 999, 1001 (9th Cir.1997). To the extent that Canyon County asserts a state law claim against Defendant

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Baseball Prop., 104 F. Supp.2d 1220, 1223 (S.D. Cal. 2000), aff'd sub nom., Chaset v. Fleer/Skybox Int'l, LP, 300 F.3d 1083 (9th Cir.2002).

Pacheco the Court declines to exercise jurisdiction over the same pursuant to § 1367(c)(3) and it will be dismissed without prejudice to Canyon County refiling the claim in state court. See Sweaney v. Ada County, Idaho, 119 F.3d 1385, 1392 (9th Cir. 1997).

ORDER

Based on the foregoing, and the Court being fully advised in the premises, it is **HEREBY ORDERED** that Defendants' Motions to Dismiss (docket nos. 29, 31, 33, 34, & 36) are **GRANTED** as follows: all federal claims set forth in Plaintiff Canyon County's First Amended Complaint are **DISMISSED with prejudice**; any state law claim for relief set forth in Plaintiff Canyon County's First Amended Complaint against Defendant Pacheco is **DISMISSED without prejudice** subject to refiling in state court; and the above entitled action is **DISMISSED** in its entirety. All other pending motions are rendered moot by this order and are dismissed.

DATED: **December 14, 2005**
Honorable Edward J. Lodge
U. S. District Judge

APPENDIX D

FOR THE DISTRICT OF IDAHO SOUTHERN DIVISION

CANYON COUNTY, A Political Subdivision of the State of Idaho,	)	Case No. CV05-306-S-EJL
Plaintiff,	)	FIRST AMENDED COMPLAINT AND DEMAND FOR A JURY TRIAL
v.	)	
SYNGENTA SEEDS, INC., a Delaware Corp., SORRENTO LACTALIS, INC., a Delaware	)	

Corporation, SWIFT	)
BEEF COMPANY,	)
a Delaware	)
Corporation,	)
HARRIS MORAN	)
SEED CO., a California	)
Corporation, and	)
ALBERT PACHECO,	)
an individual,	)
	)
Defendants.	)
	)

Plaintiff, Canyon County, a political subdivision of the State of Idaho, hereby complains of the defendants, Syngenta Seeds, Inc., Sorrento Lactalis, Inc., Swift Beef Co., Harris Moran Seed Co., Idaho Migrant Council, Inc., and Albert Pacheco, as follows:

I. INTRODUCTION

1. This is an action brought by Canyon County for damages it has suffered as a direct result of the knowing employment of large numbers of illegal immigrants by the defendants. This is hereafter referred to as "the Illegal Immigrant Hiring Scheme."

2. Canyon County has been damaged by the Illegal Immigrant Hiring Scheme because it has paid millions of dollars for health care services and criminal justice services for the illegal immigrants who have been employed by the defendants in violation of federal law.

3. By bringing this action, Canyon County seeks to be reimbursed for these costs.

II. PARTIES, JURISDICTION AND VENUE

4. Plaintiff, Canyon County, Idaho is a political subdivision of the State of Idaho.

5. Defendant Albert Pacheco is a citizen of Idaho.

6. Defendant Sorrento Lactalis, Inc. is a corporation organized under the laws of the State of Delaware with its primary place of business in the State of New York.

7. Defendant Swift Beef Co. is a corporation organized under the laws of the

State of Delaware with its principal place of business in the State of Colorado.

8. Defendant Syngenta Seeds, Inc. is a corporation organized under the laws of the State of Delaware with its principal place of business in the State of Minnesota.

9. Harris Moran Seed Co. is a corporation organized under the laws of the State of California with its principal place of business in the State of California.

10. This Court has subject matter jurisdiction over this one-count Complaint pursuant to 28 U.S.C. §1331 as a federal question, as it arises from the Racketeer Influenced and Corrupt Organizations Act (hereafter "RICO"), 18 U.S.C. § 1961, *et seq.* The Court also has jurisdiction pursuant to the statute's jurisdictional provision for civil actions, 18 U.S.C. §1964(a).

11. Venue is proper in this district because the acts giving rise to the Complaint all occurred here.

III. DEFENDANTS SYNGENTA SEEDS, INC. AND HARRIS MORAN SEED CO. HAVE COMMITTED A PATTERN OF RACKETEERING ACTIVITY THROUGH THE AG SERVICES ASSOCIATION-IN-FACT ENTERPRISE

12. Defendants Syngenta Seeds, Inc. and Harris Moran Seed Co. are growers and processors of corn and other agricultural commodities. They each have large facilities in Canyon County employing several hundred workers.

13. For at least the last three years both of these companies have engaged in an Illegal Immigrant Hiring Scheme, a deliberate pattern of employing hundreds of workers who each company knew were unauthorized for employment in the U.S.

14. The employment of these illegal immigrants violates 274 of the Immigration and Nationality Act (hereafter "the INA"),codified at 8 U.S.C. §1324(a). In particular, Canyon County alleges that these defendants have each violated 8 U.S.C. § 1324(a)(3)(A) by knowingly employing ten

(10) or more illegal immigrants per year for the last four (4) years. (This is hereafter referred to as "the knowingly hiring violation.")

15. In addition, Canyon County alleges that Syngenta Seeds, Inc. and Harris Moran Seed Co. have also violated a different provision of § 274 of the INA, 8 U.S.C. § 1324(a)(l)(A)(iii) by "harboring" illegal immigrants. Employing illegal immigrants constitutes harboring them. (This is hereafter referred to as "the harboring violation.")

16. Canyon County has determined that these defendants are engaged in an Illegal Immigrant Hiring Scheme through a farm labor contractor, Ag Services Inc., and its principal, Roberto Corral, who recruit illegal immigrants for hire.

17. These defendants have entered into a long-term agreement with Ag Services and Roberto Corral to recruit workers who are known to have entered the U.S. illegally, typically recruited by Mr. Corral himself through his business operations in Mexico. Canyon County believes Roberto Corral is the

principal of Ag Services. He operates the business from Canyon County and Mexico.

18. Syngenta Seeds, Inc. and Harris Moran Seed Co. have each agreed to employ illegal immigrants supplied by Mr. Corral and Ag Services. They know that Mr. Corral and Ag Services supply primarily illegal immigrants, thereby enabling them to easily execute the Illegal Immigrant Hiring Scheme, which they could not do on their own because they lack the virtually limitless pool of illegal Mexican workers that Mr. Corral and Ag Services offer. Additionally, through the use of Ag Services and Mr. Corral, defendants are able to distance themselves from their criminal activity, thereby using Ag Services as a "front company."

19. Accordingly, the illegal workers procured by Ag Services and Mr. Corral are paid by checks issued from Ag Services, when in reality they are employees of Syngenta Seeds, Inc. and Harris Moran Seed Co. Defendants then pay a fee to Ag Services to reimburse it for the wages it has paid to each illegal worker and an additional fee for providing the service.

20. The hiring process is "outsourced" by the defendants to Ag Services and Mr.Corral in other crucial ways. For example, Canyon County believes Ag Services and Mr. Corral complete the 1-9 forms for each illegal immigrant hired, noting on the form the fraudulent document numbers each worker is using to demonstrate employment authorization.. In fact, at all times, Ag Services, Mr. Corral and defendants know the vast majority of these workers are illegal immigrants, not authorized for employment, and have purchased or been supplied false authorization documents.

21. Canyon County believes Ag Services obtains or facilitates the procurement of false documents for each illegal worker.

22. Thus, Syngenta Seeds, Inc, and Harris Moran Seed Co. are RICO persons, pursuant to 18 U.S.C. §1961(3).

23. In addition, both Syngenta Seeds, Inc., and Harris Moran have each entered into an association-in-fact enterprise, pursuant to 18 U.S.C. § 1961(4), with both Ag Services and Mr. Corral for the procurement of primarily illegal immigrant workers.

24. These enterprises have existed over time, have a hierarchical division of roles and responsibility and have succeeded in obtaining hundreds of illegal immigrant workers for each defendant for the purpose of reducing labor costs. Thus, the Illegal Immigrant Hiring Scheme is a "pattern of racketeering activity," pursuant to 18 U.S.C. § 1961(5).

25. Each association-in-fact enterprise affects interstate commerce. Additionally, each member of the enterprise has a separate, legal existence apart from the execution of the Illegal Immigrant Hiring Scheme. Ag Services is a corporation. It supplies some legal workers to some of its clients. Mr. Corral is its principal and engages in both legal business and the racketeering activity described herein.

26. Canyon County has been proximately harmed by the racketeering activity committed by Syngenta Seeds, Inc., and Harris Moran Seed Co., the Illegal Immigrant Hiring Scheme, because it has been forced to spend money to provide medical and criminal justice services for many of these illegal immigrants.

27. Canyon County will be able to determine what portion of its damages have been caused by each defendant after conducting discovery and through expert testimony.

28. Finally, Canyon County believes the Illegal Immigrant Hiring Scheme is open-ended racketeering activity, and will not stop without judicial intervention. The defendants are dedicated to employing as many illegal immigrant workers as they can in Canyon County.

29. Therefore, Canyon County alleges that Syngenta Seeds, Inc., and Harris Moran Seed Co., have each committed a long-term pattern of racketeering activity, the Illegal Immigrant Hiring Scheme, in violation of § 274 of the INA, which is made a RICO predicate offense by 18 U.S.C. § 1961(1)(F), by participating in an association-in-fact enterprise, consisting of itself, Ag Services and Mr. Corral, in violation of 18 U.S.C. § 1962(c). (Ag Services and Mr. Corral are not named as defendants.)

IV. SORRENTO LACTALIS, INC. AND SWIFT BEEF CO. HAVE FORMED ASSOCIATION-IN-FACT ENTERPRISES WITH LABOR READY

30. Defendants Sorrento Lactalis, Inc. and Swift Beef Co. are two of the largest employers in Canyon County. Sorrento Lactalis, Inc. is a cheese processor. Swift Beef Co. is a meat packer. Each needs large numbers of unskilled and semi-skilled workers. Each has met its hiring needs for the last four years by engaging in the same Illegal Immigrant Hiring Scheme, for the same purpose, as detailed above. The only difference is that these defendants have formed association-in-fact enterprises with Labor Ready of Nampa, Idaho, primarily for the recruitment and employment of illegal immigrants. (Plaintiffs allege, however, some legal workers are also employed.)

31. Canyon County believes these association-in-fact enterprises have existed for the last four years and have resulted in the employment by each defendant of more than ten (10) illegal immigrants per year.

32. Canyon County believes these enterprises operate in the same manner as the enterprises described above and with the same results. As a direct and proximate result of the Illegal Immigrant Hiring Scheme, Canyon County has been forced to expend its resources for health care and criminal justice services for these illegal immigrants.

33. As asserted above, Canyon County has been directly and proximately harmed by the defendants' pattern of racketeering activity. The County believes it will be able to prove through discovery and expert testimony what portion of its damages have been caused by each of these defendants.

34. As asserted above, each of the defendants is a RICO person; each enterprise affects interstate commerce, and the Illegal Immigrant Hiring Scheme is ongoing, long-term racketeering activity which will not stop unless halted by judicial intervention.

35. Additionally, the objective of the Illegal Immigrant Hiring Scheme is to reduce labor costs.

36. Accordingly, Canyon County alleges that both of these defendants have violated § 1962(c) of RICO by committing a pattern of racketeering activity, the Illegal Immigrant Hiring Scheme, through each association-in-fact enterprise with Labor Ready.

V. ALBERT PACHECO HAS CONSPIRED TO HARBOR ILLEGAL IMMIGRANTS IN CANYON COUNTY AND TO PRESENT FALSE CLAIMS TO THE COUNTY

A. Fraudulently Obtaining Benefits From The Canyon County Indigent Fund For Known Illegal Immigrants

37. Defendant Albert Pacheco (Pacheco) has been Executive Director of the Idaho Migrant Council, a non-for-profit corporation (hereafter "the Council"), since 2003. The Council provides services to needy persons (hereafter "Council recipients"). Pacheco has directed his staff of case workers at the Council to provide services to Council recipients without regard to their immigration status.

38. During the course of the relationships which develop between the case workers and Council recipients, the case workers come to know that many of these persons are illegal immigrants and are using falsified identity documents, typically Resident Alien and Social Security Cards which they have illegally purchased.

39. Pacheco has been advised by the case workers that many of the Council recipients are illegal immigrants using false identity documents. He has consistently directed the case workers to ignore these facts and continue to take steps to enroll these illegal immigrants onto federal, state and county social programs with their false identity documents (hereafter "Pacheco's Policy of Willful Blindness and Harboring"). Pacheco knows these people are ineligible to receive any "public benefit" pursuant to federal law, 8 U.S.C. §1621, and is therefore, directing his staff to harbor these illegal immigrants by shielding them from detection, law enforcement and deportation proceedings.

40. Accordingly, pursuant to Pacheco's Policy of Willful Blindness and Harboring,

Council case workers have taken known illegal immigrants to the Canyon County Courthouse and completed applications for medical assistance from the County's indigent fund knowing these people were using false and stolen drivers licenses and social security numbers, and further knowing they are making false statements on their Uniform County Medical Assistance Applications regarding their status as U.S. Citizens or Legal Aliens, sponsors, spouse's citizenship or lawful resident alien status.

41. Many such persons have subsequently obtained assistance from the County's indigent fund as a result of Pacheco's Policy of Willful Blindness and Harboring, which has cost the County an unspecified sum of money.

B. Fraudulently Obtaining Housing For Illegal Immigrants Through The Caldwell Housing Authority

42. Pursuant to Pacheco's Policy of Willful Blindness and Harboring, he has directed his staff at the Council to take efforts to obtain housing on behalf of persons known to be using false and fraudulent

identity documents, i.e., are illegal immigrants. Pacheco does so in violation of 8 U.S.C. § 1621, which bars illegal immigrants from receiving any "public benefits," which includes housing provided by the Caldwell Housing Authority.

43. Pursuant to these directions, the Caldwell Housing Authority, whose executive director is Pacheco's wife, has provided housing to these illegal immigrants. Many of these illegal immigrants have cost Canyon County money by seeking public assistance from the County, to which they are not entitled, and by burdening the County's criminal justice system when they commit crimes.

C. Pacheco's Actions Violate RICO

44. As indicated, Pacheco has committed a pattern of racketeering activity, knowingly harboring illegal immigrants, through the Idaho Migrant Council, which is a RICO enterprise, pursuant to 18 U.S.C. § 1961(4). This enterprise affects interstate commerce.

45. The objective of Pacheco's racketeering activity is to obtain public assistance for illegal immigrants.

46. Pacheco's harboring of illegal immigrants is a pattern of racketeering activity pursuant to 18 U.S.C. § 1961(5), which has proximately damaged Canyon County by fraudulently causing it to expend money for these illegal immigrants.

47. Canyon County believes Pacheco is conspiring with others at the Idaho Migrant Council to perpetrate his racketeering activity. Therefore, the County alleges he has violated 18 U.S.C. § 1962(d), by conspiring to harbor illegal immigrants in violation of 18 U.S.C. §1962(c), with as of yet unnamed co-conspirators.

D. Pacheco's Actions Violate the Idaho Racketeering Act

48. In addition, Pacheco's Policy of Willful Blindness and Harboring violates the Idaho Racketeering Act. As indicated, the policy results in the submission of false claims for payment to Canyon County. By conspiring to submit false documents to the

County, Pacheco has violated Idaho Code, § 18-2706, which is a felony.

49. This provision is made a "racketeering" offense by § 18-7803(10) of the Idaho Racketeering Act (hereafter "the Act").

50. Canyon County asserts a claim against Pacheco pursuant to § 18-7804(d) of the Act for his pattern of conspiring to violate 18-2706, as described herein, through the Idaho Migrant Council, an enterprise, continuously, since 2003.

51. Canyon County is entitled to damages caused by Pacheco's violations of the Act, pursuant to § 18-7805 of the Act.

VI. PRAYER FOR RELIEF

52. Canyon County seeks damages as follows:

> A. Judgment in its favor against all of the defendants in an amount triple the damages each has caused Canyon County through its or his racketeering activity, pursuant to 18 U.S.C. § 1964(c);

B. Judgment against Albert Pacheco in an amount triple the damages he has caused Canyon County through his racketeering activity, pursuant to § 18-7805 of the Act.

C. For costs incurred in pursuing this action pursuant to *Federal Rules of Civil Procedure*, Rule 54 and §18-7805(a) of the Act.

D. For reasonable attorney' fees pursuant to 18 U.S.C. § 1964(c) and § 18-7805(a) of the Act;

E. For an injunction prohibiting Albert Pacheco from further participation with the Idaho Migrant Council or any other organization which seeks payments from Canyon County, pursuant to § 18-7805(c) and (d) of the Act;

F. For such other relief as this Court may deem just and proper.

VII. DEMAND FOR JURY TRIAL

53. Plaintiff hereby demands a jury trial pursuant to *Federal Rules of Civil Procedure,* Rule 38(b).

Dated this 17th day of August, 2005.

CANYON COUNTY, a Political Subdivision of the State of Idaho,

/s/Howard Foster
Pro Hac Vice
Johnson & Bell, Ltd.
55 E. Monroe Street,
Suite 4100
Chicago, IL 60603
(312) 372-0770
fosterh@jbltd.com

Michaelina B. Murphy,
ISB #4990
Charles M. Murphy,
ISB #4991
Murphy Law Offices, PLLC
P. 0. Box 339
Caldwell, ID 83606
(208) 453-9700
rnia@murphylawoffice.com
Attorneys for Plaintiff

Certificate of Service

I certify that on the 17th day of August, 2005, I served a copy of the foregoing on CM/ECF Registered Participants as reflected on the Notice of Electronic Filing. Additionally, a copy of the foregoing was served on the following parties by first class mail, postage prepaid, addressed to:

Mark Getson
Stoel Rives LLP
101 S. Capitol Boulevard
Suite 1900
Boise, ID 83702

Michelle R. Barrett
Nancy E. Pritikin
650 California Street
20th Floor
San Francisco, CA 94108

/s/Howard Foster
Pro Hac Vice
Johnson & Bell, Ltd.
55 E. Monroe Street
Suite 4100
Chicago, IL 60603
(3 12) 372-0770
fosterh@jbltd.com

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08-182

IN THE
Supreme Court of the United States

CANYON COUNTY,

Petitioner,

v.

SYNGENTA SEEDS, INC., *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Keely E. Duke
Hall, Farley, Oberrecht & Blanton, P.A.
702 West Idaho, Suite 700
Post Office Box 1271
Boise, Idaho 83701
(208) 395-8500

Juan P. Morillo*
Steven T. Cottreau
Laura J. McLaren
Todd A. Spiegelman
Clifford Chance US LLP
2001 K Street N.W.
Washington, DC 20006
(202) 912-5000

Counsel for Respondent Sorrento Lactalis, Inc.

* Counsel of Record

[Additional Counsel Listed on Inside Cover]

September 15, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Richard A. Leasia
Littler Mendelson, PC
50 West San Fernando Street
15th Floor
San Jose, California 95113

Richard H. Greener
Greener Banducci Shoemaker P.A.
The Carnegie Building
815 West Washington Street
Boise, Idaho 83702

Counsel for Respondent Harris Moran Seed Co.

Marie R. Yeats
Karen L. Hirschman
Vinson & Elkins LLP
101 Fannin, Suite 2300
Houston, Texas 77002

Counsel for Respondent Swift Beef Co.

George R. Wood
Littler Mendelson, P.C.
1300 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402

Counsel for Respondent Syngenta Seeds, Inc.

Cynthia J. Woolley
Law Offices Of Cynthia J. Woolley, PLLC
180 First Street West, Suite 107
P.O. Box 6999
Ketchum, Idaho 83340

Counsel for Respondent Albert Pacheco

QUESTIONS PRESENTED

1. Does a municipal government's provision of law enforcement and health care services satisfy the civil standing requirement that a plaintiff be "injured in his business or property" under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c)?

2. May a court dismiss a civil RICO complaint for lack of proximate causation where a municipality alleges that employers of unauthorized workers are liable for increased costs of providing law enforcement and health care services?

RULE 14.1(B) STATEMENT

Petitioner's "List of Parties" (Pet. ii) is accurate.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, each of the respondents states the following:

Syngenta Seeds, Inc. states that it is a wholly owned subsidiary of Syngenta Corporation, which is wholly owned by Syngenta, A.G., a Swiss corporation. Syngenta, A.G.'s shares are publicly traded on the Swiss stock exchange, with American repository receipts traded on the New York Stock Exchange.

Sorrento Lactalis, Inc. states that it is owned by parent company Lactalis American Group, Inc., a Delaware corporation, which holds 100 percent of the stock of Sorrento Lactalis, Inc. Lactalis American Group, Inc. is owned by B.S.A., a French société anonyme, which is a privately-traded corporation. No publicly-traded company owns 10 percent or more of Lactalis American Group, Inc.'s stock.

Swift Beef Company states that it is a wholly-owned subsidiary of Swift & Company, which is in turn a wholly-owned subsidiary of S&C Holdco 3, Inc., a privately held Delaware corporation.

Harris Moran Seed Company states that it is a California corporation and is not a publicly held corporation or other publicly-held entity. Harris Moran Seed Company has a parent corporation, Vilmorin USA Corp., which owns a controlling number of shares of the Harris Moran Seed Company corporation. No publicly held corporation owns 10 percent or more of Harris Moran Company's stock, although both non-publicly traded Vilmorin USA Corp., a Delaware corporation, and Hazera Quality Seeds, Inc., an Israeli

corporation, each own in excess of 10 percent of the Harris Moran Company shares outstanding. Vilmorin & Cie., a French, publicly-traded corporation, owns a controlling number of shares in Vilmorin USA Corp. Groupe Limagrain, a French co-operative organization that is not publicly traded, owns a controlling interest in Vilmorin & Cie.

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STATUTORY PROVISIONS

Section 1961(4) of Title 18 to the United States Code provides that:

> "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity ....

Section 1962(c) of Title 18 to the United States Code provides that:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Section 1964(c) of Title 18 to the United States Code provides that:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee ....

STATEMENT OF THE CASE

This case arises from a novel effort by Canyon County, Idaho to twist civil RICO beyond recognition. Petitioner sued the respondents under RICO to recover for an alleged "injury" which no court has ever permitted a municipality to recover: providing municipal government services (here, law enforcement and health care services).

1. Petitioner sued four of the County's largest private employers: Syngenta Seeds, Inc.; Sorrento Lactalis, Inc.; Swift Beef Company; and Harris Moran Seed Co. (collectively, the "respondent corporations"). In a complaint devoid of factual detail, petitioner alleged each respondent corporation formed a separate association-in-fact RICO enterprise by conspiring with a temporary staffing agency to employ and harbor employees who were unauthorized to work in the United States. Pet. App. 74a-82a. Petitioner cursorily claimed that as a result of such unlawful employment, "it has been forced to spend money to provide medical and criminal justice services for many of these illegal immigrants." *Id.* at 78a. *See also id.* at 81a.

Petitioner also sued Albert Pacheco, the former Executive Director of the Idaho Migrant Council, a non-profit charity that "provides services to needy persons." Pet. App. 82a. Petitioner alleged that Mr. Pacheco set for the charity a policy of willful blindness to the possibility that "many of the [charity] recipients are illegal immigrants using false identity documents." *Id.* at 83a. With the charity's help, many of these recipients allegedly obtained public medical assistance and housing provided by another charity. *Id.* at 83a-85a. Petitioner alleged that "these illegal immigrants have cost Canyon County money by seeking public assistance from the County ... and by burdening the County's criminal justice system when they commit crimes." *Id.* at 85a.

2. Respondents moved to dismiss the complaint on several grounds. First, they argued that petitioner's claims fail because the costs of providing governmental services are not an injury to "business or property" as required by RICO. Respondents relied in part on the common law's municipal cost recovery rule, which prohibits local governments from recovering in tort for providing government services. *See City of Flagstaff v. Atchison, Topeka & Santa Fe Ry.*, 719 F.2d 322 (9th Cir. 1983) (Kennedy, J.). Second, respondents argued that petitioner failed to satisfy RICO's proximate

cause requirement because petitioner's alleged injuries—the provision of government law enforcement and health care services—lack any connection to the alleged RICO violations, which related to the respondent corporations' employment practices. Third, respondents argued that petitioner failed to allege a legally sufficient RICO "enterprise," an indispensable element of a RICO claim. Fourth, respondents maintained that the complaint failed to allege the requisite elements of any RICO predicate act.

The district court dismissed the complaint, holding that petitioner's allegations of increased expenditures for law enforcement and health care services did not constitute an injury to business or property under RICO. Pet. App. 67a. The court relied upon the common law's municipal cost recovery rule, which generally prohibits a local government from recovering in tort for providing municipal services. *Id.* at 55a-66a.

3. A unanimous panel of the Ninth Circuit affirmed. The Ninth Circuit based its ruling on two principal alternative grounds. *First*, it held that the County lacked standing to bring a RICO claim because a municipality's decision to provide government services does not constitute an injury to its "business or property." *Second*, the Ninth Circuit held that even if petitioner's alleged injury was cognizable under RICO, petitioner still lacked standing because it failed to allege proximate causation. It applied this Court's decision in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), and reasoned in part that "just as in *Anza*, the cause of the plaintiff's asserted harms is a set of actions (increased demand by people within Canyon County for public health care and law enforcement services) entirely distinct from the alleged RICO violation (the defendants' knowing hiring of undocumented workers)." Pet. App. 41a.

REASONS FOR DENYING THE WRIT

The petition is not worthy of the Court's review. No circuit split exists, and the Ninth Circuit provided two independent grounds for its affirmance of the dismissal of petitioner's complaint. Neither of those alternative grounds—much less both—warrant this Court's attention.

The Ninth Circuit held that petitioner's provision of governmental services is not an injury to business or property. Petitioner claims a circuit split on this issue (Pet. 14), but none exists. Petitioner misreads the Ninth Circuit's decision below as imposing a "commercial injury" requirement based upon an analogy to the identical language in the Clayton Act. The Ninth Circuit, however, held that petitioner's claims fail no matter how one interprets RICO's injury to business or property requirement—whether by reference to its plain meaning, state property law, or this Court's Clayton Act precedents. In any event, this case is a poor vehicle to examine these issues: Petitioner conceded below that the general common law ban on municipal cost recovery applied to RICO and also conceded that RICO's standing requirements should be similar to the Clayton Act's requirements.

Even if petitioner was correct that its purported government services injury constituted an injury to business or property (which it does not), the Ninth Circuit's decision also rests independently on petitioner's failure and inability to plead proximate causation. Petitioner wrongly contends that this Court's cases hold that any non-derivative injury is compensable under RICO. Pet. 19-21. Instead, the Ninth Circuit's ruling is a faithful and fact-bound application of this Court's ruling in *Anza*. Petitioner's theory of harm—with a lengthy causal chain and numerous intervening causes—satisfies no theory of causation that could be deemed *proximate*.

I. THE ISSUE OF WHETHER PETITIONER ALLEGED AN INJURY TO ITS BUSINESS OR PROPERTY DOES NOT WARRANT REVIEW.

To bring a civil action under RICO, a plaintiff must allege that he has been "injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). Petitioner seeks review of the Ninth Circuit's holding that a municipality is not injured in its business or property when it provides law enforcement services and health care programs. In urging review, however, petitioner misstates the holding below and those of other circuit courts. No circuit court has held that a municipality's provision of governmental services provides that government a right to recover treble damages under RICO.

A. The Ninth Circuit Correctly Concluded That a Municipality Does Not Suffer an Injury to Its Business or Property When It Provides Governmental Services.

In its complaint, petitioner alleged that it was injured "because it has paid millions of dollars for health care services and criminal justice services for the illegal immigrants who have been employed by the defendants in violation of federal law." Pet. App. 72a. Petitioner maintains that the Ninth Circuit affirmed the dismissal of its complaints "primarily because it found nothing in the legislative history of RICO to indicate Congress intended for this type of claim to be asserted." Pet. 8. That, however, is not a fair reading of the decision below. The Ninth Circuit did not base its conclusion primarily on the legislative history of RICO. Rather, it held that under *any* meaning of the "business or property" injury requirement, petitioner's provision of governmental services does not qualify.

First, the court correctly observed that "the ordinary meaning of the term 'property' does not include the interests of local governments in performing functions such as

policing, caring for the indigent sick, and otherwise protecting the well-being of the public." Pet. App. 23a. Property generally refers to things that are owned or possessed—not, as here, government programs that a municipality elects to offer. *See Webster's 3d New Internat'l. Dictionary* 1818 (3d ed. 1969) (defining property as "something that is or may be owned or possessed"); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979) (giving same meaning to identical term in the Clayton Act). Moreover, one does not commonly refer to government as being injured in its property when it decides to provide public services. See Pet. App. 22a (finding "it particularly inappropriate to label a government entity 'injured in its property'" under these circumstances).[1]

Second, the Ninth Circuit considered whether petitioner had a property interest at stake by looking to state property law. Pet. App. 23a-24a. *See Diaz v. Gates*, 420 F.3d 897, 899 (9th Cir. 2005) (en banc) (in interpreting § 1964(c), courts "typically look to state law to determine whether a particular interest amounts to property" (internal quotation marks omitted)), *cert. denied sub nom.*, *Parks v. Diaz*, 546 U.S.

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[1] Here, a government entity made a policy choice to provide the law enforcement and health care services at issue. For example, with respect to the indigent health care services at issue, petitioner has intentionally avoided the issue of whether it was required to provide those services under Idaho law. Either way it was not "injured." If the County was obligated to pay certain medical costs for illegal immigrants (because the state chose to require such expenditures under medical indigency laws), then the County suffered no "injury"—it merely followed a state policy choice. If, however, Canyon County chose to provide those medical services even though state law did not obligate it to do so, that decision is a local government policy choice—not an injury to business or property. *See City of Flagstaff*, 719 F.2d at 324 (Kennedy, J.) ("If the government has chosen to bear the cost for reasons of economic efficiency, or even as a subsidy to the citizens and their business, the decision implicates fiscal policy; the legislature and its public deliberative processes, rather than the court, is the appropriate forum to address such fiscal concerns.").

1131 (2006); *Doe v. Roe*, 958 F.2d 763, 768 (7th Cir. 1992) ("While federal law governs most issues under RICO, whether a particular interest amounts to property is quintessentially a question of state law."). The court, however, found "no indication that Idaho law creates a property-like entitlement in such [governmental] services on the part of counties." Pet. App. 23a. As noted by the district court, Idaho case law "strongly suggest[s] that a non-contractual interest in reimbursement for governmental services is not a recognized property right." *Id.* at 59a n.6 (citing *City of Grangeville v. Haskin*, 777 P.2d 1208, 1211-12 (Idaho 1989) (holding that Idaho law did not permit a city to collect charges for water, sewer, and garbage services from residents who had not contracted for such services)).

Third, consistent with the parties' briefing, the Ninth Circuit drew support from this Court's jurisprudence regarding the Clayton Act's analogous civil enforcement provisions. Pet. App. 20a-21a, 24a-28a. The Supreme Court has "repeatedly observed that Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act." *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 267 (1992) (citation omitted).[2] Section

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[2] In *Holmes*, this Court applied the Clayton Act's requirement of proximate causation to civil RICO actions, reasoning that

> We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4. It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.

503 U.S. at 268 (citation omitted). *See also Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 150-51 (1987) (noting the Clayton Act offered the "closest analogy to civil RICO" in part because "both statutes aim to compensate the same type of injury"); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1985) (analyzing the legislative *(continued)*

4 of the Clayton Act provides a private right of action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15. *See also id.* § 15(a) (permitting the federal government to recover when it suffers the same injury). In *Hawaii v. Standard Oil Co. of California*, this Court affirmed dismissal of Hawaii's Clayton Act claims to recover for injuries to the State's economy (brought in the State's *parens patriae* capacity). 405 U.S. 251, 265 (1972). The Ninth Circuit observed below that this Court held that the Clayton Act "'does not authorize recovery for economic injuries to the sovereign interests of a State.'" Pet. App. 26a (quoting *Hawaii*, 405 U.S. at 265). Such a limitation—drawn from an interpretation of identical language in the Clayton Act—provided further confirmation of the holding below.

Fourth, the Ninth Circuit explained below that "the common law doctrine barring government recovery of the costs of public safety services in tort supports our holding." Pet. App. 31a. The so-called municipal cost recovery bar holds that a municipality cannot recover from private parties the costs of providing government services, irrespective of the underlying theory of liability. *See City of Flagstaff*, 719 F.2d at 324 (Kennedy, J.). For instance, in *District of Columbia v. Air Florida, Inc.*, the D.C. Circuit rejected the District of Columbia's claim for the costs of emergency services incurred when defendant's airplane crashed. 750 F.2d 1077 (D.C. Cir. 1984). It reasoned that "[t]he general common-law rule in force in other jurisdictions" provides that "'the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service.'" *Id.* at 1080 (quoting *City of Flagstaff*, 719 F.2d at 323). Below, the Ninth Circuit correctly looked to these precedents

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history of the RICO Act and finding that "[t]he clearest current in that history is the reliance on the Clayton Act model.").

to find support for its conclusion that petitioner does not suffer a compensable *injury* when it makes a decision to provide governmental services. Although petitioner asserts that reliance on these precedents amounted to an impermissible rewriting of RICO (Pet. 11-13), the Ninth Circuit was simply doing what this Court has instructed: looking to the common law meaning of "injured" when interpreting that same word in RICO. *See Beck v. Prupis*, 529 U.S. 494, 504 (2000) ("Congress meant to incorporate common-law principles when it adopted RICO."); *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2140 (2008) (noting the general "presumption that Congress intends to adopt the settled meaning of common-law terms" in RICO).

B. Petitioner Conceded Below the Legal Points It Now Disputes.

Petitioner complains that the Ninth Circuit "construed 'business or property' in § 1964(c) in the same manner as in the Clayton Antitrust Act." Pet. 14. Petitioner, however, is the party that urged the Ninth Circuit to do so. In its opening appellate brief, petitioner wrote that § 1964(c) of RICO is "to be interpreted in tandem with § 4 of the Clayton Antitrust Act, upon which it was based." Appellant's Br. at 7 (9th Cir. 2008) (No. 06-35112).

Likewise, before the district court, petitioner did not dispute the application of the municipal cost recovery rule to this case. As the district court explained, petitioner "appears to concede the existence of the municipal cost recovery rule." Pet. App. 55a. As a result, the district court analyzed whether one of the two common law exceptions to the rule applied. *Id.* at 55a-66a. Petitioner cannot reverse course now on legal issues it conceded below.

C. No Circuit Split Exists.

Petitioner alleges a 2-2 circuit split over "whether the phrase 'business or property' [in § 1964(c)] requires an antitrust injury." Pet. 14. No such split exists.

Contrary to petitioner's claim (Pet. 14-15), the Ninth Circuit never held that a RICO plaintiff must allege an "antitrust injury" or a "competitive injury." Rather, that court held only that the mere fact that a municipality alleges that "it has spent money in order to act governmentally" does not mean that it has suffered an "injury to property." Pet. App. 21a.[3] On that holding, the count in the circuit courts is 1-0, because the Ninth Circuit is the first and only circuit court to decide the issue of whether a government can recover under RICO for providing government services.

Petitioner wrongly contends that the Ninth Circuit's decision "conflicts with the Seventh and Eighth Circuits' conclusions" in a trio of cases that are more than two decades old. Pet. 5 (claiming a split with *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1981); *Schacht v. Brown*, 711 F.2d 1343 (7th Cir. 1983); and *Illinois Dep't. of Revenue v. Phillips*, 771 F.2d 312 (7th Cir. 1985)). Although each of these cases rejects the notion that a RICO injury must be a competitive injury (a proposition with which the Ninth Circuit below did not disagree), none of these cases involve recovery for a RICO injury predicated upon the provision of government services.

The Eighth Circuit's decision in *Bennett v. Berg* involves neither a claim by a government nor a claim to recover for the

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[3] The Ninth Circuit rejected petitioner's suggestion, noting that "Contrary to the County's argument, in holding that the costs of their law enforcement and public health care services are not recoverable damages under civil RICO, we are *not* inserting an additional injury requirement into § 1964(c)." Pet. App. 34a (emphasis added).

provision of government services. 685 F.2d at 1056. That case instead was brought by residents of a retirement community. *Id.* Those residents claimed to have been deprived of the value of their community occupancy agreements as a result of the defendants' fraud. *Id.* at 1058. The question presented here regarding RICO standing to recover for providing government services simply was not at issue in that case.

Likewise, the Seventh Circuit's decision in *Schacht v. Brown* did not involve government services. That case involved a suit by an insurance commissioner acting in his capacity as "the statutory liquidator" of a failed insurance company. 711 F.2d at 1344. *See also id.* at 1346 n.3 ("the Director [of Insurance] may pursue no action which could not have been asserted directly by [the insurer] before liquidation"). The *Schacht* plaintiff's theory of injury was that the defendants drove the insurer "deeper into insolvency." *Id.* at 1345. Accordingly, the commissioner brought causes of action that belonged to the company for wrongs against the company—not claims by a municipality for government services it provided.

The other Seventh Circuit decision, *Illinois Department of Revenue v. Phillips*, also did not involve an injury relating to the provision of government services. 771 F.2d at 312-13. Instead, this case dealt with a tax fraud scheme that deprived the State of sales tax revenues. *Id.* Whether a scheme to avoid taxes causes a government injury to its business or property is an entirely distinct question from whether a government suffers such an injury when it decides to provide municipal services. The fraudulent avoidance of taxes due, like the theft of an account receivable, may (or may not) be deemed an injury to property under RICO. But that issue is subject to an analysis distinct from the issue presented by this petition, which involves the provision of government services. For example, standing for tax fraud may turn upon the purely monetary nature of the loss, the fact that a

government is legally entitled to the money, or the fact that the fraud involuntarily deprived the government of the money. None of these issues, however, are involved in the question of whether a government opting to provide particular municipal services is injured in its business or property under RICO.[4]

For similar reasons, the Second Circuit is not implicated in the alleged conflict. Petitioner argues that the Second Circuit is aligned with the Ninth Circuit because the Second Circuit imposed an antitrust injury requirement in *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990). Pet. 9. In that case, a municipality also sought to recover the costs of providing government services, including increased police services. 915 F.2d at 103. The Second Circuit first held that the plaintiff failed to allege any RICO predicate acts. *Id.* at 102-03. The court then went on to note that the "[i]njuries of the sort asserted by the Town do not fall within the ambit of section 1964(c)." *Id.* at 104. The Second Circuit, however, has noted that this latter pronouncement was mere dicta. *See Att'y Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 132 n.40 (2d Cir. 2001). In fact, the Second Circuit recently reiterated that dicta interpretation and held that a government could sue under RICO for lost tax revenue. *See City of New York v. Smokes-Spirits.com, Inc.*, No. 06-1665-cv(L), 2008 WL 4058373, at *11 (2d Cir. Sept. 2, 2008). Like the Seventh Circuit's decision in *Illinois Department of Revenue*, however, the question of tax revenues due presents a separate issue from the provision of government services.

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[4] In fact, the Seventh Circuit's general approach to RICO standing is similar to that of the Ninth Circuit's reasoning below. *See Doe*, 958 F.2d at 767-68 (analyzing state common law to determine whether civil RICO plaintiff had been injured in her business or property).

That two circuits agree that tax revenue deprivation is an injury to business or property does not create a split with the Ninth Circuit's decision below that the provision of government services is not. The Ninth Circuit remains the only circuit to have addressed the issue of a municipality's standing to recover for the provision of governmental services.

II. PETITIONER'S ALLEGED INJURIES ARE NOT DIRECT.

Petitioner has alleged one of the most far-flung causation theories imaginable. It claims (with no factual detail) that each of the corporate respondents separately conspired with a "labor contractor" to hire illegal aliens. Pet. App. 75a-76a, 80a. Petitioner then leaps to the conclusion that the employment of those workers caused the county to have to arrest them for crimes unrelated to their employment and provide them with medical care for illnesses unrelated to their employment. Petitioner's theory of causation is anything but proximate or direct, as RICO requires.

A. The Ninth Circuit Correctly Applied This Court's Precedents.

Under RICO's civil damages provision, a plaintiff must demonstrate that it was injured in its business or property "by reason of a violation of section 1962," which is RICO's substantive offense provision. 18 U.S.C. § 1964(c). As this Court has repeatedly explained, to satisfy the "by reason of" requirement, a civil RICO plaintiff must demonstrate more than a "but-for" relationship between an alleged RICO violation and an injury to its business or property. A plaintiff also must show proximate causation—"some direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268. *See also Bridge*, 128 S. Ct. at 2142 (explaining that a finding of proximate causation for RICO claims requires that a "particular emphasis" be

placed on the "demand" for a direct relation between the asserted injury and the alleged RICO violation).

This Court further explained civil RICO's causation requirements in its recent decision in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006). In *Anza*, plaintiff Ideal Steel Supply Corp. ("Ideal") brought a RICO action against its competitor and its owner-operators, alleging that they unlawfully failed to pay state sales tax, thereby undercutting plaintiff's prices by not charging sales tax to customers who paid in cash. *Id.* at 454. This Court concluded that Ideal's injuries were not proximately caused because "[t]he cause of Ideal's asserted harms ... is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)." *Id.* at 458. This Court emphasized that the "central question" in assessing proximate causation under RICO is "whether the alleged violation *led directly to the plaintiff's injuries*." *Id.* at 461 (emphasis added).

The *Anza* Court explained the rationales underlying the direct injury requirement. First, the direct injury requirement avoids the "difficulty that can arise when a court attempts to ascertain the damages caused by some remote action." *Id.* at 458-59. Under such circumstances, causation would always be uncertain. *See id.* at 459 (reasoning that "the fact that a company commits tax fraud does not mean the company will lower its prices; the additional cash could go anywhere" and defendant "could have lowered its prices for any number of reasons unconnected to the asserted pattern of fraud"). Second, insistence on a direct injury minimizes "the speculative nature" of the proceedings needed to assess damages. *Id.* As this Court explained, "[b]usinesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of Ideal's lost sales were the product of National's decreased prices." *Id.* In short, the direct injury requirement prevents "intricate, uncertain inquiries from overrunning RICO litigation." *Id.* at 460.

Below, the Ninth Circuit faithfully applied this Court's *Anza* decision and concluded that proximate cause did not exist. The Ninth Circuit concluded that a direct injury was absent because "just as in *Anza*, the cause of the plaintiff's asserted harms is a set of actions (increased demand by people within Canyon County for public health care and law enforcement services) entirely distinct from the alleged RICO violation (the defendants' knowing hiring of undocumented workers)." Pet. App. 41a.

The Ninth Circuit found support for its conclusion based upon the same factors relied upon by the *Anza* Court. First, it noted "the difficulty of assessing causation" because "the asserted causal chain ... is quite attenuated, and there are numerous other factors that could lead to higher expenditures by the County." *Id.* The court explained that "it is not clear how the companies' hiring of undocumented immigrants would increase demand for health care and law enforcement" and "there are numerous alternative causes that might be the actual source or sources of the County's alleged harm." *Id.* at 41a-42a.

Second, the court explained that "the proceedings required to evaluate the County's injury would be speculative in the extreme, perhaps more so than those discussed in *Anza*." *Id.* at 42a. In addition to calculating the increased demand for government services due to the companies' employment practices, the court would have to "construct the alternative scenario of what would have occurred had the companies employed legally authorized workers, and determine how this might have affected the County's total population, and how these alternative workers might have differed from the undocumented workers in their consumption of County services, if at all." *Id.* at 43a. Ultimately, the Ninth Circuit concluded that "[t]his would be an 'intricate, uncertain' inquiry of the type that the *Anza* Court warned against." *Id.*

B. Petitioner's Arguments Are Misplaced.

Petitioner disputes the Ninth Circuit's application of *Anza* for three different reasons. First, petitioner incorrectly contends that dismissal is only appropriate where the plaintiff suffers a derivative or passed on harm. Pet. 21 (asserting that the "conclusion that *Anza* applies ... 'where the harm to the plaintiff ... *does not flow through any intervening victims*' is flatly wrong" (quoting Pet. App. 44a)). That view may be consistent with this Court's decision in *Holmes v. SIPC*. 503 U.S. at 268 (upholding dismissal of plaintiff's RICO claim as indirect because it "complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts"). But *Anza* makes clear that RICO's proximate cause requirement requires more than a non-derivative injury. As set forth above, the *Anza* plaintiff did not suffer a derivative injury—it alleged that it suffered its own competitive injury that was not passed on to it from a more direct victim. Nonetheless, this Court dismissed its RICO claims. Thus, *Anza* only can be read to stand for the proposition that a non-derivative injury must still be proximate. Petitioner simply misunderstands *Anza*.[5]

Second, petitioner contends that a party has standing to sue under RICO so long as its "Complaint does not indicate a more immediate victim of the RICO violations." Pet. 21.

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[5] Petitioner presented this same mistaken view of *Anza* to the Ninth Circuit, which properly rejected it (Pet. App. 44a):

> We are ... unpersuaded by the County's attempt to distinguish *Anza* as a "derivative or passed-on" injury case. It is true that the Court in *Holmes* dealt with derivative injury, in the sense that any harm to the plaintiff occurred only to the extent that a direct victim's injuries were "passed on," or flowed through another victim. But there was no such "passed on" harm in *Anza*: the plaintiff alleged that it lost business due to the defendant's lowered prices, a harm which was distinct from and not contingent on the harm suffered by the state due to the defendant's sales tax fraud.

Petitioner simply wishes to read the *proximate* cause requirement out of RICO. On petitioner's view, no matter how remote the alleged harm may be, a remotely injured party has standing under RICO so long as no other party suffers a "more immediate" injury. The Ninth Circuit properly rejected this view, explaining that it "need not inquire into the question of whether there are more immediate victims of the defendants' alleged RICO violations who are likely to sue" where the asserted injury is remote and would spawn the speculative, uncertain proceedings that *Anza* held were inappropriate. Pet. App. 42a-43a.[6] The Ninth Circuit's interpretation of *Anza* in this respect is consistent with the common law of proximate causation, which does not award damages to the least remotely-injured party. Indeed, petitioner cites no case where a circuit court holds that a remote injury at the end of an attenuated causation chain satisfies proximate cause simply because the injury was less remote than the injuries of other parties.[7]

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[6] Petitioner maintains that the Ninth Circuit's application of *Anza* "conflicts with the proximate causation analysis law of every other Circuit." Pet. 19. Petitioner, however, cites primarily pre-*Anza* cases. See *id.* at 20 n.21. The one case decided after *Anza*—*Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277 (11th Cir. 2006)—did not hold that the most directly (or least indirectly) injured party always satisfies proximate causation. Instead, *Williams* held only that proximate causation was met after a review of all of the factors discussed in *Anza*. *Id.* at 1287-88.

[7] In the wake of *Anza* a number of courts have held it appropriate to dismiss RICO claims for lack of a direct relationship between the injury and the alleged violation, without conducting an analysis of whether the plaintiff was the most direct victim. *See, e.g., Sanchez v. Triple-S Mgmt. Corp.*, 492 F.3d 1, 13-14 (1st Cir.) (dismissing plaintiffs' RICO claim for lack of proximate causation because plaintiffs failed to show "a direct injury as a result of [the predicate act]"), *cert. denied*, 128 S. Ct. 806 (2007). In *Bridge v. Phoenix Bond & Indemnity Co.*, this Court recently reaffirmed the need to assess at the pleading stage whether the complaint alleges "a sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury." 128 S. Ct. 2131, 2144 (2008).

Third, petitioner claims that it may recover because the common law of respondeat superior imposes liability on employers for the acts of their employees. Pet. 21-24. Petitioner misses the point. None of the legal principles cited by petitioner stands for the proposition that a plaintiff suing on a respondeat superior theory need not satisfy the demands of proximate causation. Even if they did, such common law cause of action requirements are no substitute for the statutory requirements in RICO.[8]

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[8] Petitioner incorrectly claims its attenuated causal chain is consistent with state common law theories of employer liability. Pet. 21-24. Even if those theories were relevant, the authorities cited by petitioner are inapposite because they support liability where the injury caused is related to employment. *See Cullen v. BMW of N. Am., Inc.*, 691 F.2d 1097, 1098 (2d Cir. 1982) (holding that automobile distributor did not negligently supervise dealership owner who allegedly stole plaintiff customer's car payments); *Tallahassee Furniture Co. v. Harrison*, 583 So. 2d 744, 753 (Fla. Dist. Ct. App. 1991) (upholding liability of furniture company for negligently hiring deliveryman who assaulted a customer); Restatement (3d) of Agency § 7.05 cmt. c, illus. 5 ("Liability ... requires some nexus or causal connection between the principal's negligence in selecting or controlling an actor, the actor's employment or work and the harm suffered by the third party"); Restatement (2d) of Torts § 302(B) cmt. e, illus. 6 (noting that employer who hires employee knowing of his violent temperament will be liable to a third party injured only if the employer "brought [the two] into contact or association"); *id.* § 307 cmt. a, illus. 2 (explaining that employer who knowingly hires incompetent employee will be liable to a third party injured because of employee's poor workmanship); *id.* § 317 (noting that employer will generally be liable to a third party injured by employee if the injury occurs while the employee "is upon the premises in possession of the [employer]"); *id.* § 449 cmt. b, illus. 3 (stating that an employer will be liable for injuries caused by employees whom the employer knows are conducting themselves on the job in a manner likely to cause injury).

III. ADDITIONAL GROUNDS FOR AFFIRMANCE COUNSEL AGAINST REVIEW.

For the reasons set forth above, the two alternative grounds for dismissal set forth by the Ninth Circuit are simply not worthy of review judged on their own merits. In any event, the flawed nature of petitioner's enterprise and substantive RICO allegations provide additional grounds for affirmance of the judgment below and further counsel against review in this case.

A. Petitioner's Enterprise Allegations Are Flawed.

Petitioner has vaguely alleged four association-in-fact enterprises. Each enterprise consists of an association-in-fact between one of the respondent corporations and a local labor contractor. Pet. App. 75a-77a, 80a-82a.

Under the plain meaning of RICO's enterprise definition, however, a corporation cannot be a member of an association-in-fact enterprise. RICO defines an association-in-fact enterprise as a "group of *individuals* associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphasis added). The language and structure of the statute make plain that a corporation is not an *individual*.

In ordinary usage, the term "individual" refers to natural persons rather than legal entities. The noun "individual" means "a single human being as contrasted with a social group or institution." *Webster's 3d New Internat'l. Dict.* 1152 (3d ed. 1969). The limitation of the term "individual" to natural persons is supported by the framework of § 1961 itself. The first clause of § 1961(4) includes both "any individual" and "corporation" as legal persons that may constitute a RICO enterprise. Had the term "individual" included within its scope "corporation," the inclusion of the latter term in that clause would be redundant.

Because the plain language of § 1961(4) does not include an association-in-fact enterprise with corporate members,

petitioner's enterprise allegations are insufficient and provide yet another reason why review in this case is unwarranted.[9]

B. No Substantive RICO Offense Is Alleged.

Petitioner's complaint also fails because it does not plead violations of the alleged substantive RICO offense, 18 U.S.C. § 1962. That provision provides that "[i]t shall be unlawful for any person employed by or associated with any enterprise ... to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs."

This Court has explained that a RICO defendant must be distinct from the enterprise whose affairs the defendant conducts. *See Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001). To state a violation of § 1962(c), a plaintiff must demonstrate "the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Id.* Here, petitioner alleges that the respondent corporations have entered into association-in-fact enterprises with recruiting agents to recruit illegal immigrant workers. A corporation's use of third-party agents to perform tasks such as obtaining workers, however, does not create a separate enterprise. Corporations can only function through the employees, agents, and third parties who work on their behalf. An "enterprise" of a defendant corporation and agents acting on

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[9] A more fulsome presentation of the arguments in support of this interpretation of RICO's enterprise definition (and of the other arguments in Section III of this brief) are set forth in petitioner's briefs in *Mohawk Indus., Inc. v. Williams*, No. 05-465 (2005). In fact, the United States conceded in that case that a corporation was not an "individual" within the meaning of RICO's enterprise definition. See Br. for United States at 6, *Mohawk Indus.*, No. 05-465 (Mar. 16, 2006) ("a corporation is not an 'individual' within the meaning of section 1961(4)"). This Court, however, did not reach the enterprise issue and instead remanded that case for further consideration in light of *Anza*. See Order, *Mohawk Indus.*, No. 05-465 (June 5, 2006).

its behalf "is in reality no more than the defendant itself." *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994).[10]

Additionally, petitioner must demonstrate that the respondent corporations "conducted or participated in the conduct of the *enterprise's* affairs, not just their *own* affairs." *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (internal quotation marks omitted). Yet the only racketeering activity that petitioner alleges is the respondent corporations' employment of their own workers. Such employment, however, is not the conduct of an enterprise—it is only the conduct of the corporations themselves. *See Baker v. IBP, Inc.*, 357 F.3d 685, 691 (7th Cir. 2004) (Easterbrook, J.) (rejecting virtually identical enterprise allegations, explaining that the allegations established only that the defendant "operate[d] *itself* unlawfully" by "supposedly hir[ing], harbor[ing], and pay[ing] the unlawful workers, for the purpose of reducing its payroll"). Petitioner in this case has only alleged facts indicating that the respondent corporations operated *themselves* unlawfully by employing illegal aliens.

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[10] *See also, e.g., Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1997) (defendant corporation cannot form distinct RICO enterprise with its "agents [and] affiliates"); *Brittingham v. Mobil Corp.*, 943 F.2d 297, 303 (3d Cir. 1991) (defendant corporation and advertising agencies working on its behalf do not form distinct RICO enterprise), *overruled on other grounds by Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995).

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Keely E. Duke
Hall, Farley, Oberrecht
& Blanton, P.A.
702 West Idaho, Suite 700
Post Office Box 1271
Boise, Idaho 83701
(208) 395-8500

Juan P. Morillo*
Steven T. Cottreau
Laura J. McLaren
Todd A. Spiegelman
Clifford Chance US LLP
2001 K Street N.W.
Washington, DC 20006
(202) 912-5000

Counsel for Respondent Sorrento Lactalis, Inc.

Richard A. Leasia
Littler Mendelson, PC
50 West San Fernando Street
15th Floor
San Jose, California 95113

Richard H. Greener
Greener Banducci Shoemaker
P.A.
The Carnegie Building
815 West Washington Street
Boise, Idaho 83702

Counsel for Respondent Harris Moran Seed Co.

Marie R. Yeats
Karen L. Hirschman
Vinson & Elkins LLP
101 Fannin, Suite 2300
Houston, Texas 77002

Counsel for Respondent Swift Beef Co.

George R. Wood
Littler Mendelson, P.C.
1300 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402

Counsel for Respondent Syngenta Seeds, Inc.

Cynthia J. Woolley
Law Offices Of Cynthia J.
Woolley, PLLC
180 First Street West, Suite 107
P.O. Box 6999
Ketchum, Idaho 83340

Counsel for Respondent Albert Pacheco

September 15, 2008

* Counsel of Record

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IN THE

Supreme Court of the United States

CANYON COUNTY,

Petitioner,

v.

SYNGENTA SEEDS, INC., *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF OF PETITIONER

HOWARD W. FOSTER
Counsel of Record
JOHNSON & BELL, LTD.
33 W. Monroe Street
Suite 2700
Chicago, IL 60603
(312) 372-0770

PAUL J. ORFANEDES
JAMES F. PETERSON
JUDICIAL WATCH, INC.
501 School Street, S.W.
Suite 500
Washington, DC 20024
(202) 646-5172

Counsel for Petitioner

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REPLY BRIEF OF PETITIONER

Petitioner, Canyon County, has demonstrated that this case presents important questions in the administration of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (hereafter "RICO") that reflect splits in the circuits and about "proximate cause," a factor in all damage litigation, not just RICO . As to the first question, whether the term "business or property" should be read plainly, the Respondents split hairs and contend that there is a difference between a lawsuit to collect unpaid taxes (which is one for property) and one to collect lost revenue (which is not). This is a distinction without a difference, and no authority supports it. In fact, on September 2, 2008, after the Petition was filed, the Second Circuit switched its position from agreeing with the Ninth Circuit's analysis of this question to flatly opposing it. City of New York v. Smokes-Spirits.Com, Inc. ("Thus, we hold that lost taxes can constitute injury to business or property for purposes of RICO..." distinguishing Canyon County).[1] This

[1] _ F.3d _, 2008 U.S. App. LEXIS 18746 at *44 (2d Cir. Sept. 2, 2008).

highlights the need to resolve the split created by the Ninth Circuit.

As to the second question, Respondents try to justify the Ninth Circuit's peculiar approach to proximate causation by asserting that this Court radically changed the concept two years ago in Anza v. Ideal Steel Supply Corp.[2] Now, according to Respondents, the direct injury requirement has been dispensed with and replaced by the touchstone of "remoteness." But City of New York and a Seventh Circuit decision issued after the Petition was filed refute Respondents' contention.[3] Neither Circuit changed the proximate causation analysis in light of Anza, and both consider a range of factors in this analysis.

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[2] 547 U.S. 451 (2006).

[3] RWB Serv. LLC v. Hartford Computer Group, Inc., 2008 U.S. App. LEXIS 18142 at *16-17 (7th Cir. Aug. 25, 2008)(concluding that proximate causation under RICO is determined primarily by the foreseeability of harm, that there can be multiple victims of a RICO violation, each being able to assert a direct injury, and that this analysis was not altered by Anza).

I. THERE IS NO REAL DIFFERENCE BETWEEN AN ACTION TO COLLECT TAXES AND ONE TO COLLECT REVENUE.

As Canyon County argued, the phrase "business or property" in § 1964(c) of RICO is capacious enough to include a government's claims to collect unpaid taxes. And this creates a clear split with the Ninth Circuit. Petition at 10. Respondents contend there is no split of authority because the Second and Seventh Circuits did not address the use of RICO to seek recovery for the costs of providing "government services," and the two are materially different. Respondents' Brief In Opposition at 11 (hereafter "Respondents' Br."). Since both the failure to pay taxes and the depletion of government revenues through the improper use of services cost money, and money is property, there is no distinction from the standpoint of the "business or property" inquiry. *See, e.g.*, Reiter v. Sonotone, 442 U.S. 330, 339 (1979)(holding that the loss of money was an injury to "property"). Although Canyon County is the first reported appellate decision where a government entity has used RICO to recover the costs of providing services, the

Sixth and Fifth Circuits have upheld the right of counties to sue for recovery of excessive charges,[4] payments made higher than the market price, and for goods not received.[5]

Moreover, it is well-settled that a municipality may sue to recover money paid without authority. 15 Eugene McQuillin, THE LAW OF MUNICIPAL CORPORATIONS, § 39:47 (3d ed. 2005)("The familiar rules are that: (1) when the money of a municipality has been paid out on a contract or for an indebtedness which the municipality has no authority to make or incur, it may be recovered...").[6] As noted in the Petition, in

[4] County of Oakland v. City of Detroit, 866 F.2d 839, 847 (6th Cir. 1989)("the counties at least sustained an injury in their property when they paid the allegedly excessive charges").

[5] Alcom County Miss. v. U.S. Interstate Supplies, Inc., 731 F.2d 1160 1169 (5th Cir. 1984) (fraud in inducing contract payments higher than market value and for goods not received held to be an injury to "business or property")

[6] The Idaho Supreme Court has expressly upheld governmental actions to recover or protect tax revenues from improper depletion. Independent Sch. Dist. v. Common Sch. Dists., 55 P.2d 144, 147 (Idaho 1936)(holding that a school district could sue for "recovery or protection" of its funds). Moreover, the

1996 Congress amended RICO to enable "persons" (which includes government entities) to sue to recover the damages caused by the employment of illegal immigrants. Petition at 3. That year Congress, in a second law addressing the illegal immigration problem, also forbade local and state governments from providing services to illegal immigrants.[7] Against this sea change in public policy, the Ninth Circuit reached the extraordinary conclusion that it is "particularly inappropriate to label a governmental entity injured in its property when it spends money on the provision of additional public services, *given that those*

Idaho Racketeering Act, modeled on the federal RICO statute, makes it a predicate offense to submit a "false or fraudulent claim" to a county for payment. Idaho Code § 18-2706. Canyon County asserted this claim against Respondent Pacheco.

[7] 8 U.S.C. § 1621(a)(3)(providing that an unauthorized alien is "not eligible for any State or local public benefit," which includes all non-emergency services). Respondents contend that Canyon County "made a policy choice to provide the law enforcement and health care services at issue." Respondents' Br. at 6 n.1. Canyon County never made a "choice" to provide these services to illegal aliens. Congress foreclosed that possibility a decade earlier.

services are based on legislative mandates and are intended to further the public interest."[8] How did Canyon County "further the public interest" by providing taxpayer dollars to criminal aliens using fraudulent identity documents when Congress expressly prohibited such expenditures? No answer was provided. And why did the Ninth Circuit simply ignore the Idaho cases expressly allowing counties to sue to recover funds improperly disbursed? No answer was provided. Why is Canyon County different from Oakland County or Alcorn County other than its Circuit?

Respondents also point out that the Ninth Circuit noted that "the common law doctrine barring government recovery of the public safety services in tort supports our holding." Respondents' Br. at 8; Pet. App. 31a.[9] Respondents fail to point out that the Ninth Circuit correctly held the municipal cost

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[8] Pet. App. 22a (emphasis added) (citation omitted).

[9] This doctrine is known as the "municipal cost recovery rule." *See, e.g.*, City of Flagstaff v. Atcheson, Topeka & Santa Fe Ry. Co., 719 F.2d 322 (9th Cir. 1983)(recognizing the application of the rule to bar recovery of the Arizona common law claim of a city in a diversity suit).

recovery rule has no application to this RICO case. "In this instance, we are not dealing with state common law, but with a statutory cause of action created by Congress." Pet. App. 32a. Respondents further assert that Petitioner somehow "conceded" application of the rule to this case. Respondents Br. at 9. This is incorrect. In the district court, Canyon County conceded that the rule existed but argued forcefully that it had no application in this RICO case. Pet. App. 55a.

Finally, Respondents contend Canyon County urged the Ninth Circuit to construe the term "business or property" in a manner which bars its claim. Respondents' Br. at 9. This too is incorrect. Canyon County noted that this Court has held twice that § 1964(c) of RICO was modeled on § 4 of the Clayton Antitrust Act.[10] But that does not mean a RICO plaintiff must also prove an antitrust injury to recover. This Court has twice rejected that notion. Petition at 17-18.

In conclusion, Respondents have not demonstrated the absence of a circuit split on the important question of whether recovery of

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[10] Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268 (1992); Anza, 547 U.S. at 457.

expenditures for illegal aliens is "business or property" under § 1964(c). The Second Circuit's timely reversal on this point and its express acknowledgment of a split created by the Ninth Circuit's decision in this case underscores the split is real and the need to resolve it now.[11]

II. RESPONDENTS ACKNOWLEDGE THE NINTH CIRCUIT'S APPROACH TO PROXIMATE CAUSATION IS AT ODDS WITH EVERY OTHER COURT.

The Petition's second question is premised upon the Ninth Circuit's conclusion that the County's claimed injury was not proximately caused by the Respondents' RICO violations. In its analysis the Ninth Circuit rejected the suggestion that it consider whether there was a more immediate victim of the RICO violations which would intervene in the

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[11] To reiterate, the Sixth and Fifth Circuits permit counties to sue under RICO to recover improper payments, and the Second and Seventh Circuits have permitted counties to use RICO to recover unpaid taxes. The split with the Ninth Circuit is thus 4-1. Once again, the Ninth is an outlier; it should be returned to the range of the law of the other circuits.

causation analysis. It held that step in the analysis was unnecessary ("we need not inquire into the question whether there are more immediate victims of the defendants' alleged RICO violations who are likely to sue").[12] In the Ninth Circuit's view, the possibility of "numerous alternative causes that might be the actual source or sources of the County's alleged harm," Pet. App. 42a, made it clear that the County's claim failed this Court's test for proximate causation.

A. The Ninth Circuit's Interpretation of *Anza* Creates a Three-Circuit Split.

The Ninth Circuit and Respondents contend this analysis – dismissal because of the possibility of other causes – is mandated by one sentence in Anza: "The cause of Ideal's asserted harms, however, is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)."[13] Both the Ninth Circuit and Respondents read this sentence out of context. The context in Anza was that Plaintiff Ideal Steel expressly pleaded that the RICO violations had harmed the State of

[12] Id. at 983.

[13] Anza, 547 U.S. at 458.

New York, which the Court properly construed as the direct injury. Once a more direct injury of the RICO violations of mail fraud was admitted, then Ideal Steel was properly viewed as asserting an indirect injury.[14]

B. "Substantial Factor," Not "Sole Cause," is the Proximate Cause Test.

Neither the Ninth Circuit nor Respondents have cited to a decision of any other court which has followed the Canyon County proximate cause analysis either before, or after, Anza.[15] The Petition cites a plethora of decisions from across the Circuits, adhering to the view that claims alleging direct injury satisfy the proximate causation requirement.

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[14] Id. at 460, "There is no need to broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly."

[15] In a footnote, Respondents assert that Sanchez v. Triple-S Mgmt. Corp., 492 F.3d 1, 13-24 (1st Cir. 2007) supports their view that there is precedent for "dismissal" of a RICO claim because of the perceived speculativeness or remoteness of the harm. Respondents' Br. at 17 n. 7. This case does not support that proposition, as it merely affirmed a summary judgment entered after "voluminous" discovery and did not analyze proximate causation.

Petition at 20 n. 21. Respondents counter that these decisions are pre-Anza. Respondents' Br. at 17 n. 6. City of New York is post-Anza and holds to the contrary, directly conflicting with the Ninth Circuit's analysis:

> [W]e do not read the Supreme Court's holding in Anza to disrupt the substantial factor doctrine. So long as the defendant's acts played a substantial part in causing the alleged injury, those acts may be said to have directly caused the injury, as Anza requires.[16]

Accordingly, the Second Circuit concluded that the City's injury, lost tax revenues, satisfied both Holmes and Anza because it was a direct injury.[17] The Second Circuit also limited Anza to competitor versus competitor claims for lost profits.[18] The Seventh Circuit has recently issued an opinion which also refutes Respondents' assertion that Anza changed the law. It holds, "Saying that the

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[16] City of New York, 2008 U.S. App. LEXIS at *37 n. 23 (internal citation and quotations omitted).

[17] Id. at *34 n. 21.

[18] Id. at *33.

injury to the plaintiff is direct is akin to saying that the victim was reasonably foreseeable, the traditional principle for hemming in tort liability."[19]

The principle to be drawn here is that proximate cause does not mean sole cause, and once that is understood, then the concerns with "speculation" and "remoteness of injury" must be put to one side.[20] This Court's opinion in Bridge makes it clear that foreseeability of harm is very much a part of the inquiry.[21] For this reason, proximate cause is ordinarily a merits question for the jury.[22] And every Circuit except the Ninth

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[19] RWB Serv., 2008 U.S. App. LEXIS 18142 at *16.

[20] Sosa v. Alvarez-Machain, 542 U.S. at 692, 704 (2004)("but a given proximate cause need not be, and frequently is not, the exclusive proximate cause of the harm")(internal citation omitted).

[21] Bridge, 128 S. Ct. 2131, 2144 (2008).

[22] *See, e.g.*, Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 612 (6th Cir. 2004) ("Proximate cause poses a merits question involving common law and prudential limitations on the consequences for which the law will hold a defendant accountable, regardless of the plaintiff's standing to sue. *See* Holmes, 503 U.S. 258, 268"); Hedrick v. Daiko Shoji Co., 715 F.2d 1355, 1357 (9th Cir. 1983).

has applied this fact-based inquiry to questions of proximate causation in RICO.[23]

C. The County's Case is not Difficult to Prove, and Harm Caused by Employing Illegal Immigrants Was Foreseeable as a Matter of Law.

The County can easily prove its RICO case. All it needs to do is establish that the illegal immigrants who have signed up for its welfare program or were incarcerated were

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[23] *See, e.g.*, Williams v. Mohawk Indus., Inc., 465 F.3d 1277, 1288 n.5 (11th Cir. 2006)("In both federal RICO and federal antitrust cases proximate cause is not... the same thing as sole cause, and it is enough for the plaintiff to plead and prove that the defendant's tortuous or injurious conduct was a substantial factor in the sequence of responsible causation")(internal quotations omitted); Trollinger, 370 F.3d at 619; Holmes, 503 U.S. at 269 ("Proximate cause is a flexible concept..."); Phoenix Bond & Indem. Co. v. Bridge, 477 F.3d 928, 930 (7th Cir. 2007)("The Court acknowledged in Holmes that proximate causation, a term long used in tort law, poses a set of questions to ask; it is not a formula to be applied algorithmically. Is someone else a distinctly better enforcer? Does the presence of intermediate parties make it too hard to calculate damages - or create a risk that recovery by this plaintiff will come at the expense of someone with a better claim?"), aff'd., 128 S. Ct. 2131 (2008).

employed by the Respondents.[24] Thus, the Ninth Circuit's conclusions about the difficulty of proving the County's case, Pet. App. 42a-43a, are sheer speculation and quite wrong. Moreover, the well-established rules of the Restatements of Torts and Agency support the County's case on the issue of the foreseeability of harm from employing known criminals. Pet. 21-24. Respondents counter that these rules do not establish proximate causation. Respondents' Br. at 18. This is simply wrong. These rules establish the foreseeability of harm caused by employing dangerous people, thus satisfying one of the key aspects of proximate causation, as has been demonstrated. Respondents also contend the County cannot assert its claim for damages because its injury was not "related" to the employment of the illegal immigrants. Id. at 18 n.8. None of the authorities cited support this contention. As the Arkansas Supreme Court held in addressing this question: "It is not necessary

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[24] The County's Complaint alleges that Respondents use recruiters to obtain illegal immigrants who are brought into the County from Mexico to work for them. Pet. App. 75a, ¶¶ 17-18, 80a, ¶¶ 30-32. Thus, the identities of these illegal workers can be discovered.

that the employer foresee the particular injury that occurred, but only that the employer reasonably foresee an appreciable risk of harm to others."[25]

In short, the County's case does not involve a derivative injury, undue speculation or the apportionment of damages among various parties. Therefore, none of the concerns of Holmes or Anza exist here. Therefore, this Court should accept the Petition to resolve the conflict created by the Ninth Circuit's application of these cases. If left unresolved, the Ninth Circuit's mechanical sole cause approach to proximate causation will also confuse antitrust and tort litigation.

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[25] Saine v. Comcast Cablevision of Ark. Inc., 126 S.W.3d 339, 342 (Ark. 2003). This is the law in the Ninth Circuit. *See, e.g.*, Kennedy v. Ridgefield City, 439 F.3d 1055, 1064 n. 5 (9th Cir. 2006)("We have never required that, for a danger to exist, the exact injury inflicted by a third party must have been foreseeable. Instead, the state actor is liable for creating the foreseeable danger of injury given the particular circumstances" and noting it is a jury question).

III. ISSUES NOT RAISED IN THE PETITION.

Respondents additionally make arguments having nothing to do with the two questions presented in the Petition. Respondents' Br. at 19-21. But since Respondents did not file a cross-petition for certiorari, these questions are not before the Court. Additionally, they were not raised below, and consequently, were not addressed by the Ninth Circuit.

CONCLUSION

For the reasons set forth above and in the Petition, the Petition for Certiorari should be granted.

Respectfully submitted,

HOWARD W. FOSTER
Counsel of Record
JOHNSON & BELL, LTD.
33 W. Monroe Street
Suite 2700
Chicago, IL 60603
(312) 372-0770

PAUL J. ORFANEDES
JAMES F. PETERSON
JUDICIAL WATCH, INC.
501 School St., S.W.
Suite 500
Washington, DC 20024
(202) 646-5172

Counsel for Petitioner

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